89-636

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER
OF TRANSPORTATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED FOR REVIEW

a. Whether the court below erred in finding that Conn. Gen. Stat. §13a-123(e)(3) and Conn. Agencies Regs. §13a-123-7(2) are narrowly drawn to serve a significant governmental purpose and do not violate the First Amendment to the United States Constitution.

b. Whether the court below erred in concluding that the statutes and regulations in issue were content-neutral and did not violate the First Amendment to the United States Constitution because they treat commercial and non-commercial on-premises signs within 500 feet of an interstate highway interchange equally.

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No. _____

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JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
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v.

J. WILLIAM BURNS, COMMISSIONER
OF TRANSPORTATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, John P. Barrett, d/b/a Barrett Outdoor Communications, petitions this Court for a writ of certiorari to review the judgment of the Connecticut Supreme Court affirming the trial court's grant of injunctive relief and fines against the petitioner with respect to two outdoor advertising sign structures he had erected near an interstate highway in East Haven, Connecticut.

OPINION BELOW

On July 18, 1989 the Connecticut Supreme Court found that there was no error in the trial court proceedings below. The Connecticut Supreme Court rendered its opinion in *J. William Burns, Commissioner of Transportation v. John P. Barrett*, 212 Conn. 176, 561 A.2d 1378 (1989).

JURISDICTION

The petition for certiorari is for review of the opinion of the Connecticut Supreme Court in *Burns v. Barrett, supra* dated July 18, 1989. This Court has jurisdiction to review the judgment rendered below pursuant to 28 U.S.C. § 1257(a) because the validity of a Connecticut statute and regulations promulgated thereunder is questioned on the ground of their being repugnant to the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

See Appendix E for text of authorities

Constitutional Provisions

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Conn. Agencies Regs. § 13a-123-13

STATEMENT OF THE CASE

This case involves the ordered removal of two billboard structures by the Connecticut Department of Transportation for alleged violation of a Connecticut statute and regulations. The petitioner attacks the validity of the statutes and regulations (1) in creating an unconstitutional restriction on commercial speech and (2) in conjunction with the exception for signs advertising on-premises activities, Conn. Agencies Regs. § 13a-123-7(2), as unconstitutionally preferring some signs over other signs upon the basis of their content.

The petitioner, John P. Barrett d/b/a Barrett Outdoor Communications, is engaged in the sale and rental of outdoor advertising signs. Petitioner owns or operates outdoor advertising signs at 38 Bradley Street, East Haven, Connecticut and 187 Saltonstall Parkway, East Haven, Connecticut. These signs are located adjacent to Interstate Highway 95 (hereinafter "I-95"), and are located in areas zoned pursuant to state and local law for commercial or industrial use. At the time this action was commenced, the East Haven signs were under construction. Subsequently, the two-sided sign at 187 Saltonstall Parkway, East Haven, displayed a sign relating to on-premises activities on one side and a commercial sign on the other side. One side of the sign at 38 Bradley Street, East Haven, later displayed a commercial advertising message while the other side contains the editorial comment "We owe a great debt to Vietnam Vets."

Trial Court Proceedings

The respondent, J. William Burns, is the Commissioner of the Department of Transportation (hereinafter "DOT") for the State of Connecticut. On April 4, 1986, the respondent filed a second complaint, alleging that the petitioner's East Haven signs were in violation of DOT Regulation § 13a-123-5(b). The respondent claimed that the signs violated the regulation's requirement that no such sign be located within 500 feet of an interstate highway interchange.

The respondent sought temporary and permanent injunctive relief prohibiting the use of the signs and empowering the DOT Commissioner to enter petitioner's property and remove any sign used in violation of the statute. The respondent also sought reimbursement of any costs incurred in such removal, and imposition of a fine pursuant to Conn. Gen. Stat. § 21-63 and § 13a-123(j).

On April 4, 1986 the trial court, *ex parte,* granted the respondent's request for temporary injunctive relief, ordering the petitioner to appear and show cause why such relief should not be granted permanently. Subsequently, on April 10, 1986, the petitioner moved to dissolve the temporary injunction, raising, *inter alia,* the issue that the petitioner's rights under the First Amendment were being violated. This motion was granted by the trial court.

On May 15, 1986, the petitioner filed an answer, special defenses and counterclaim in the matter regarding the East Haven signs. The petitioner alleged, *inter alia,* that the requests for injunctive relief constituted a "prior restraint" in violation of the First Amendment to the United States Constitution and that the regulations relied upon by the respondent violated the petitioner's right to freedom of speech as guaranteed by the First Amendment.

In its Memorandum of Decision dated July 28, 1988, the trial court ordered the removal of both signs located at 38 Bradley Street and the commercial off-premises sign at the Saltonstall Parkway location.

The court first held that

> [a]lthough the defendant challenges the facial validity of the Connecticut billboard statute and regulations, he has failed to show that they will have a different impact on the free speech rights of anybody else than they have on him. His challenge is basically to the statute and regulations as applied to him, and the

court therefore, will limit its analysis of constitutionality to the concrete case before it.

Memorandum of Decision at 2.

On August 16, 1988 the petitioner requested clarification of the court's removal order. That clarification was issued on December 17, 1988. The court stated that both the signs and the sign structure at the Bradley Street location were to be removed, while only the commercial billboard which did not advertise an on-premises business was to be removed at the Saltonstall Parkway site.

The court found:

> In this case the evidence was that on-site advertising within interchanges, while distracting, were less so and less of a traffic hazard than off-site advertising.
>
> This court concludes, as did the United States Supreme Court in *Metromedia*, that offsite commercial billboards may be prohibited while onsite commercial billboards may be permitted.

Id. at 10.

The trial court went on to state that it "finds the Regulation barring commercial signs within five hundred feet of an interchange are [sic] constitutionally valid and that defendant's off-premises sign advertising the Chowder Pot Restaurant violates that Regulation." *Id.* at 11.

With respect to the sign located at Bradley Street in East Haven the trial court ruled:

> This court has above found that the Regulations prohibiting billboards within five hundred feet of highway interchanges serve the important objectives

> of traffic safety and esthetics and they are narrowly drawn to achieve those objectives. Moreover, the Regulations not only leave unaffected many communications media other than outdoor advertising signs (such as radio, television, newspapers, leaflets, etc.), but also allow outdoor advertising signs in a wide variety of other locations. In fact the defendant himself testified to numerous ideological messages he has proclaimed on outdoor advertising signs in authorized locations.
>
> Finally, as the Regulations are here applied at 38 Bradley Street, they are content-neutral. The panel advertising Red Writer and the panel stating the patriotic message are both violative of the Regulations, without distinction as to commercial or non-commercial communications.

Id. at 13.

The court finally examined the argument that the Connecticut statute and regulations elevate commercial speech in some instances over that of non-commercial speech.

> In the instant case, if the Vietnam Vets message was placed on the sign at Saltonstall Parkway, where the Torello Tire advertisement is permitted, there would be presented the issue dealt with in *Metromedia.* But since the sign at Bradley Street is not relative to any on-site activity and is within the protected area of the interchange, both panels, without regard to their content, are violative of the Regulations.
>
> The defendant would have this court declare the Connecticut statutes, § 13a-123 *et seq.* and § 21-50 *et seq.* and the pertinent Regulations of State Agencies unconstitutional, because the on-site commercial advertising exception raises the possibility of

favoring commercial speech over noncommercial speech under the *Metromedia* analysis. This has been the approach of the courts of some states, such as the Ohio Supreme Court in *Norton Outdoor Advertising v. Arlington Heights,* 433 N.E.2d 198 (1982). But the better wisdom is to apply constitutional principles to the facts of the case before the court. Here the facts as to the outdoor advertising signs at Saltonstall Parkway and Bradley Street, East Haven, Connecticut do not establish a basis for declaring Connecticut's regulation of billboards unconstitutional.

Id. at pp. 14-15.

Appeal Proceedings

The petitioner timely filed its appeal of the Memorandum of Decision with the Connecticut Appellate Court. The petitioner raised, *inter alia,* the following two issues when it appealed the trial court's decision to the Connecticut Appellate Court by an appeal dated September 6, 1988.

1. Did the trial court err in concluding that the statutes and regulations in issue are narrowly drawn to serve a significant governmental purpose and do not violate the First Amendment to the United States and Connecticut Constitutions?

2. Did the trial court err in concluding that the statutes and regulations in issue are content-neutral and did not violate the First Amendment to the United States and Connecticut Constitutions?

On December 13, 1988 the Connecticut Supreme Court transferred the case to itself. On July 18, 1989, in *Burns v. Barrett,* 212 Conn. 176 (1989), the Connecticut Supreme Court held:

In the present case, however, the restriction cannot be characterized as a complete ban on a standard means of communication, such as outdoor advertising, or an insurmountable barrier to reaching motorists. It is applicable only to signs within 500 feet of interchanges, leaving the remainder of the highway available for outdoor advertising, unless some other regulation prohibits it. As we have previously noted, the regulation also exempts more populous municipalities from its operation. It applies only to "interstate highways, limited access federal-aid primary highways, the limited access state highways and non-limited access federal-aid primary highways." Regs., Conn. State Agencies § 13a-123-1. The defendant is left free to erect outdoor advertising signs, even off-premises signs, along extensive stretches of our highway system. In true perspective, the restriction imposed by this regulation on the defendant's ability to communicate must be regarded as minimal. We agree with the trial court that it goes no further than necessary to achieve the important governmental purpose of reducing the risk of highway accidents at interchange areas. With respect to his commercial signs, therefore, the defendant has failed to demonstrate that the challenged regulation infringes upon his right of freedom of speech.

The remaining sign the defendant was ordered to remove was that containing his statement concerning the debt we owe to veterans of the war in Vietnam. The right to display such a political message falls classically within the protection of the first amendment and any justification for its curtailment must be greater than for a restriction on commercial speech. *Metromedia, Inc. v. San Diego, supra,* 506.

Id. at 185–86.

The Connecticut Supreme Court then stated:

> As we have previously explained, the state's interest in highway safety, especially at the more hazardous interchange areas, is quite substantial. We conclude that it is sufficiently great to justify prohibition of noncommercial billboards within 500 feet of a highway interchange as well as those bearing commercial advertisements. The higher level of state interest required for restrictions on noncommercial speech is adequately met here because of the widespread belief that billboard advertisements, both commercial and noncommercial, are distracting to motorists and threaten public safety in areas where vehicles travel at very high speeds. Indeed, noncommercial messages may be more distracting because they are usually more interesting.

Id. at 186.

In conclusion, the court found that there was no error. *Id.* at 195.

REASONS FOR GRANTING THE WRIT

A. The Connecticut Supreme Court Erred In Concluding That The Statutes And Regulations In Issue Are Narrowly Drawn To Serve A Significant Governmental Purpose And Do Not Violate The First Amendment To The United States Constitution.

The Connecticut statutes and scheme of regulations in question, unconstitutionally and unreasonably restrict the time, place and manner of commercial speech or expression.

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I. This Court has held that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 215 (1975) (quoting *Police Dep't. of Chicago v. Mosley,* 408 U.S. 92, 95 (1972)). *See also Cohen v. California,* 403 U.S. 15, 24, 91 (1971), *reh'g denied,* 404 U.S. 876 (1971). The protection of the First Amendment does not extend to certain categories of expression that have been identified by this Court. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 504 (1984) (enumerating such categories as libel, "fighting words," incitement to riot, obscenity and child pornography). Outside such categories, however, government may only regulate the content of speech when to do so would further a compelling state interest. *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.,* 460 U.S. 37, 45-46 (1983); *NAACP v. Button,* 371 U.S. 415, 438 (1963).

Until recently, this Court had included commercial speech among those categories of expression to which the protective mantle of the First Amendment does not extend. *See, e.g., Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942). In 1976,

however, this Court explicitly abandoned that position and held that speech proposing or promoting a commercial transaction was entitled to a broad measure of First Amendment protection. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-62 (1976). *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981) (plurality opinion); *Bigelow v. Virginia*, 421 U.S. 809, 825-26 (1975). This Court has not elevated commercial speech to a level commensurate with speech on matters of political, social or cultural significance. Rather, the Court has held that commercial speech is entitled to a substantial, but "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . ." *Metromedia*, 453 U.S. at 506 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), *reh'g denied*, 439 U.S. 883 (1978)). *See also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980); *Virginia Pharmacy Board*, 425 U.S. at 772 n.24.

In *Central Hudson*, this Court adopted a four-part test for determining the validity of government regulation of commercial speech. As reiterated in *Metromedia*, the *Central Hudson* standards are as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Metromedia, 453 U.S. at 507 (citing *Central Hudson*, 447 U.S. at 563-66).

All activities protected by the First Amendment are amenable to reasonable time, place and manner restrictions. *Heffron v. International Soc'y of Krishna Consciousness*,

452 U.S. 640, 647 (1981). This Court has held that time, place and manner restrictions on protected speech are permissible only if "they are justified without reference to the content of the regulated speech, . . . serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Virginia Pharmacy Board*, 453 U.S. at 771. *See also Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984); *Perry Education Association*, 460 U.S. at 45; *Metromedia*, 453 U.S. at 516; *Heffron*, 452 U.S. at 647-48.

The Connecticut Supreme Court held that the statutes and regulations under review here are narrowly drawn to achieve the objectives of traffic safety and aesthetics. A review of those regulations demonstrates that this finding was erroneous.

In the instant action, the scheme of regulation that is at issue is derived from the federal Highway Beautification Act and regulations promulgated thereunder, and the state statutes and regulations that have been enacted pursuant to the agreement between Connecticut and the federal government under the dictates of the Federal Act. In Connecticut, outdoor advertising signs are generally prohibited within 660 feet of an interstate highway, except that signs advertising activities conducted on the premises where they are located are exempt. 23 U.S.C. § 131(c)(3); Conn. Gen. Stat. § 13a-123(e)(3); Conn. Agencies Regs. § 13a-123-7(2). Signs located adjacent to such highways in areas zoned for industrial or commercial use are unaffected by federal law so long as the state agrees to adopt certain minimum standards regarding the size, lighting and spacing of such signs. 23 U.S.C. 131(d); Conn. Gen. Stat. § 13a-123(e). The State of Connecticut, in an agreement entered into with the federal government in 1967, provided for regulation of the size, lighting and spacing of signs in such zones, and later promulgated administrative regulations codifying those standards. *See* Conn. Agencies Regs. § 13a-123-5(a)-(b). Signs advertising activities conducted on the premises where they are located are exempt from these

standards. Conn. Gen. Stat. § 13a-123(e)(3); Conn. Agencies Regs. § 13a-123-7(2).

The size, lighting and spacing criteria of Conn. Agencies Regs. § 13a-123-5 unconstitutionally and unreasonably restrict the time, place and manner of commercial speech. By severely limiting the placement of outdoor advertising signs in the highly developed and heavily trafficked area adjacent to interstate highways, the regulations in question "[fail to] serve a significant government interest, and . . . [fail to] leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Nonviolence*, 468 U.S. at 288; *Perry Education Association*, 460 U.S. at 45; *Metromedia*, 453 U.S. at 516; *Virginia Pharmacy Board*, 425 U.S. at 771.

All federal and state regulations enacted pursuant to the dictates of the federal Highway Beautification Act are designed to "protect the public investment in . . . [interstate] highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a). The primary government interests at stake, therefore, are aesthetics and safety. This Court's plurality in *Metromedia*, substantially joined in relevant part by other justices, held that:

> there [can] be [no] substantial doubt that the twin goals . . . [of] traffic safety and the appearance of the city . . . are substantial government goals. It is far too late to contend otherwise with respect to either traffic safety, *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), or esthetics, *see Penn Central Transportation v. New York City*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Metromedia, 453 U.S. at 507-08.

In the instant case, however, it is insufficient for the government merely to recite the justifications for its action. Restrictions on the time, place and manner of speech must not only be justified by an appropriate government interest, they must also *serve* that interest in at least some reasonable fashion. In the highly congested and developed area adjacent to I-95, where the petitioner's signs are located, the regulations in question fail to serve the government's interests in either safety or aesthetics. It cannot reasonably be argued that the regulation of the size, lighting and spacing of outdoor advertising signs contributes in any way to improved safety or beauty along congested sections of highway. *See Metromedia*, 453 U.S. at 528–34 (Brennan, J., concurring) (noting that government regulation of outdoor advertising may not always further goals of safety and aesthetics in certain contexts).

In fact, the respondent, in effect, admitted that safety is not an issue in this case. At the hearing, the respondent conceded that the structures are legal and that the respondent is not attempting to regulate the structures or to have them taken down. (8/29/86 transcript at 142; 2/19/87 transcript at 30–31). The petitioner therefore could conceivably leave an empty structure in place, or even use it for a party, as the petitioner facetiously suggested at the hearing. The respondent conceded that it would not have any authority to prohibit such a use or to have the structure removed as long as the petitioner did not place a sign on the structure. In making these concessions, the respondent effectively admitted that enforcement of the regulations in question in these instances would not further its interest in safety. The respondent cannot reasonably argue that the structures would be more of a distraction with signs than without signs. Mr. Gubala, the state's safety expert, in fact, admitted that a structure without a sign could be an even greater distraction and safety hazard to drivers than it would be with a sign. (2/20/87 transcript at 28–29). In light of these concessions by the respondent, the Connecticut Supreme Court's ruling that the statute was narrowly drawn to meet safety interests is clearly erroneous.

The assertion that the regulations in question do not further the state's interest in safety or aesthetics when they are applied in a congested urban area is buttressed by an exception built into the regulatory scheme. Conn. Agencies Regs. § 13a-123-5 provides that the prohibition against signs within 500 feet of an exit ramp does not apply in towns of over 40,000 as of the 1960 census. This exception recognizes that the problems with finding suitable locations for commercial and non-commercial messages in congested urban areas outweighs the minimal effect that restricting signs in these areas would have on improving safety and aesthetics.

The Connecticut Supreme Court erroneously states that "[w]hatever may be the reasons for excepting more populous areas from the regulation, the omission does not refute the conclusion of the trial court that the regulation does enhance highway safety in the areas where the defendant has been enjoined to remove the signs he has erected in violation of the regulation." *Burns*, 212 Conn. at 185.

Furthermore, the regulations in question in the instant case fail to leave the petitioner ample alternative channels for the speech at issue. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), this Court struck down as unconstitutional a municipal ordinance prohibiting the posting of "For Sale" and "Sold" signs on residential property. The Court concluded that the ordinance did not leave open "ample alternative channels for communications," *id.* at 93 (quoting *Virginia Pharmacy Board*, 425 U.S. at 771), and was therefore an unreasonable restriction on the time, place and manner of the affected speech. The Court said sellers in the real estate market would be relegated to other media — newspapers and private listings — that would "involve more cost and less autonomy than 'For Sale' signs." *Linmark*, 431 U.S. at 93. Advertisers, the court concluded, would be "less likely to reach persons not deliberately seeking . . . [the] information." *Id. See also Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (striking down a municipal ban on door-to-door distribution of literature, in part because, as applied, it

greatly reduced the plaintiffs' ability to reach their intended audience). *Cf. United States v. O'Brien*, 391 U.S. 367, 388–89 (1968) (Harlan, J., concurring) (arguing that no government regulation of speech should "ha[ve] the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate").

In the instant case, the state's regulation of the size, lighting and spacing of outdoor advertising signs in areas zoned for industrial or commercial use fails to leave ample alternative channels open through which advertisers such as the petitioner may reach their desired audience. Certainly, the broad and lucrative market that one can reach through advertising adjacent to an interstate highway might not be available to the same degree through other media. The petitioner is therefore "less likely to reach persons not deliberately seeking . . . [the] information," *Linmark*, 431 U.S. at 93, and is likely to confront "more cost and less autonomy" in efforts to reach a similar audience through other channels. *Id.*

The regulations in question "ha[ve] the effect of entirely preventing . . . [the petitioner] from reaching a significant audience with whom he could not otherwise lawfully communicate." *O'Brien*, 391 U.S. at 388–89 (Harlan, J., concurring). Moreover, large billboards placed along interstate highways are a unique form of communication. Their style and messages are designed to appeal to and have an effect on a broad segment of the motoring public, as opposed to, for example, a local audience or an audience defined by readership or viewing habits. A statute which restricts a "uniquely valuable form of expression cannot be defended on the basis that the speaker can express the same views in a different manner or forum." *Regan v. Time, Inc.*, 468 U.S. 641, 678 (1984). The regulations in question place an unconstitutional and unreasonable restriction on commercial speech. Therefore, this Court should grant the Writ of Certiorari to the Petitioner.

B. The Connecticut Supreme Court Erred In Concluding That The Statutes And Regulations In Issue Were Content-Neutral And Did Not Violate The First Amendment To The United States Constitution.

1. The statutes and regulation in issue are unconstitutional because they do not favor non-commercial speech over commercial speech.

In the instant case, the Connecticut Supreme Court attempted to skirt a well-established distinction between the protection afforded to commercial and non-commercial speech. Although there is no doubt that non-commercial speech is entitled to greater protection than commercial speech, as the ensuing analysis establishes, the Connecticut Supreme Court avoided this principal by stating: "Our interpretation of the on-site exception in this case . . . does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements that have some reasonable relationship to an activity conducted thereon." *Burns,* 212 Conn. at 190.

As the following discussion indicates, however, even this approach is insufficient to pass constitutional muster. Because the First Amendment provides greater protection to non-commercial than to commercial speech, mere equal treatment of the two types of expression is not enough. Thus, the holding by the Connecticut Supreme Court in affirming the trial court's decision that the statutes and regulations at issue here are content-neutral and congruent with the protections of the First Amendment is erroneous.

The Constitution affords greater protection to non-commercial speech than it does to commercial speech and, therefore, the effects of a statute on each type of speech must

be considered separately.[1] *Metromedia*, 453 U.S. at 504–05. A state cannot favor commercial speech over non-commercial speech and statutory or regulatory schemes which have this effect have been struck down as violating the first amendment. *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985) (town ordinance allowing on-site commercial signs and prohibiting non-commercial signs held unconstitutional because it favored commercial speech and distinguished on the basis of content); *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986) (ordinance found constitutional after amendment exempting non-commercial signs added), *cert. denied*, 107 S. Ct. 1334 (1987); *Van v. Travel Information Council*, 52 Or. App. 399, 628 P.2d 1217, 1224–27 (1981) (striking down Oregon regulations that broadly allow on-site commercial signs but imposed narrow time limitations on the posting of non-commercial political signs). *Adams Outdoor Advertising v. City of Newport News*, Record No. 880126 (Va. Nov. 18, 1988) (ordinance prohibiting all off-premises signs held unconstitutional as favoring commercial speech over non-commercial speech).

In *Metromedia*, this Court struck down the ordinance in question because it permitted on-site commercial messages where it did not allow non-commercial messages. This Court held that the fact that a city (or state) may value on-site commercial speech more than off-site commercial speech does not justify prohibiting a non-commercial message where a commercial one is allowed. *Id.* at 512. If a governmental entity recognizes that its interest in regulating commercial speech is not greater than a landowner's or merchant's interest in

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[1] Although the respondent recognized that two types of commercial speech are involved here — off-site and on-site — it failed to note that noncommercial speech is also involved or to distinguish between commercial and noncommercial speech. The respondent has apparently equated commercial and noncommercial speech, treating the petitioner's commercial signs in the same manner as its noncommercial sign honoring the Vietnam veterans. The respondent does not acknowledge that different standards apply to each type of speech and that noncommercial speech is afforded greater protection than commercial speech.

advertising on-site activities, then it cannot claim that its interest in regulating commercial speech is greater than an individual's interest in expressing a non-commercial message. *Id.* at 520–21. A statutory scheme which favors commercial speech over non-commercial speech has been characterized as a "peculiar inversion of first amendment values." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15–16 (1st Cir. 1980).

The regulations and statutes in issue here create such a "peculiar inversion" for they too permit commercial speech where non-commercial messages are not allowed. For example, C.G.S. § 13a-123(e) and Conn. Agencies Regs. § 13a-123-7 exempt on-site commercial signs from the prohibition against signs within 500 feet of another sign or an exit ramp. A non-commercial sign, however, is not permitted in these areas for there is no similar exemption for non-commercial signs. Such a statute is obviously contrary to the holding of *Metromedia* and its progeny for it impermissibly distinguishes between two different types of speech based on content and favors commercial speech over non-commercial speech. *See Matthews*, 764 F.2d at 60 (ordinance distinguishing between commercial and non-commercial speech impermissibly distinguishes on basis of content). This statutory scheme is unconstitutional on its face in that it prevents the defendant from displaying political and ideological messages which it has traditionally conveyed while allowing signs for commercial goods and services. *Id.* at 61 (ordinance favoring commercial over non-commercial speech unconstitutional on its face).

Under *Metromedia* the prohibition against non-commercial signs cannot be justified as a time, place or manner restriction. *Id.* at 515–16; *Matthews*, 764 F.2d at 60. The regulations here distinguish between signs based on their content and thus, with regard to their effect on non-commercial speech, they are not entitled to a finding of constitutionality if they meet the standards for time, place and manner restrictions. *Virginia Pharmacy Board*, 425 U.S. at 771.

In *National Advertising Company v. City of Orange*, 861 F.2d 246 (9th Cir. 1988), the Ninth Circuit held the City of Orange's sign ordinance in violation of the First Amendment because it regulated non-commercial billboards based on their content. The offending ordinance expressly barred "advertising signs related to a business, commodity, 'industry *or other activity* which is sold, offered or conducted' elsewhere than on the premises." 861 F.2d at 247 (emphasis in the original). The Ninth Circuit concluded that the ordinance is unconstitutional because "[m]erely treating non-commercial and commercial speech equally is not constitutionally sufficient. The First Amendment affords greater protection to non-commercial than to commercial expression." *Id.* at 248. Another recently decided case, *National Advertising Co. v. Town of Babylon*, 703 F. Supp. 228 (E.D.N.Y. 1989) reiterates the findings of the *Metromedia* plurality opinion which held that "an ordinance will not pass constitutional muster if it favors any type of commercial speech over non-commercial speech." *Metromedia*, 453 U.S. at 513, *quoted with approval*, *National Advertising Co. v. Town of Babylon*, 703 F. Supp. at 237.

In summary, the Connecticut Supreme Court attempted to shield the statutory and regulatory scheme from certain constitutional infirmity by concluding that commercial and non-commercial signs are treated equally. This attempt, however, falls short under First Amendment doctrine. Non-commercial expression is entitled to more protection than commercial expression under the First Amendment and thus equal treatment of the two is constitutionally deficient.

CONCLUSION

Because Connecticut has upheld a statute and regulations that neither serve a significant governmental purpose nor are content-neutral as applied, the First Amendment rights of the petitioner have been violated. This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER
OF TRANSPORTATION,
Respondent.

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APPENDIX A

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION *v.* JOHN P. BARRETT
(13570)

PETERS, C. J., HEALEY, SHEA, CALLAHAN, GLASS, COVELLO and HULL, Js.

The defendant appealed from the judgment of the trial court imposing fines on him and ordering certain injunctive relief with respect to two outdoor advertising sign structures that he had erected on property bordering an interstate highway, and that the plaintiff commissioner of transportation had sought to have removed. Each structure supported two billboard panels. On one of the structures, one panel advertised a product sold on the property where the structure was located, while the other panel advertised an off-premises business. One panel on the other structure also advertised an off-premises business, while the other contained a noncommercial statement. The trial court determined that both structures violated a regulation (§ 13a-123-5 [b]) of the department of transportation prohibiting sign structures within 500 feet of a highway interchange. The commissioner conceded, however, that the panel

advertising the on-premises business was legal in that it fell within the exception (§ 13a-123-7) for signs advertising "activities being conducted upon the real property where the sign is located." On the defendant's appeal, *held:*

1. With respect to the commercial signs, the defendant failed to demonstrate that the regulation on which the trial court based its action impinged on his right to freedom of speech; there is a substantial governmental interest in ensuring public safety on highways, the regulation may reasonably be viewed as implementing that interest and it goes no further than necessary to achieve that purpose.
2. With respect to the noncommercial sign, the state's interest in highway safety, especially at hazardous interchange areas, is sufficiently great to justify the prohibition of such signs within 500 feet of those areas; moreover, the defendant's claim that the exception for signs advertising on-premises activities is an impermissible content-based restriction on speech favoring commercial speech over noncommercial speech was unpersuasive, noncommercial signs related to activites conducted on the premises of a sign structure being included in the exception.
3. There was no merit to the defendant's claim that the injunction ordering him to remove the entire structure supporting the prohibited off-premises sign and noncommercial sign constituted an unconstitutional prior restraint on his right to freedom of speech.
4. The defendant's claim that injunctive relief should have been denied because of the statutory (§ 13a-123 [j] and 21-63) availability of fines as enforcement devices was unavailing; the commissioner is authorized by statute (§ 13a-123 [i]) to order the removal of structures erected in violation of the law, and the injunction merely implemented an order that he was authorized to make.

Argued May 2—decision released July 18, 1989

Action to enjoin the defendant from constructing certain outdoor advertising signs, and for other relief, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to the court, *Satter, J.;* judgment for the plaintiff, from which the defendant appealed. *No error.*

James A. Wade, with whom, on the brief, was *Lori B. Wilson,* for the appellant (defendant).

Kathryn Mobley, assistant attorney general, with whom, on the brief, was *Clarine Nardi Riddle,* acting attorney general, for the appellee (plaintiff).

SHEA, J. In this action the plaintiff commissioner of transportation sought the removal of three outdoor advertising sign structures erected by the defendant upon private property bordering interstate route 95 (I-95), two of the signs being located in East Haven and one in Bridgeport. The trial court imposed fines and granted injunctive relief with respect to the East Haven signs on the ground that they violated regulations of the department of transportation prohibiting the location of sign structures within 500 feet of a highway interchange and did not fall within any of the exceptions in the regulations. The Bridgeport sign was found not to violate any regulation and the court denied all relief with respect thereto.

The defendant has appealed from the judgment, claiming that (1) the regulations and statutes on which the court relied violate federal and state constitutional provisions[1] concerning freedom of speech; (2) the injunction issued by the trial court constitutes a prior restraint upon freedom of speech; (3) injunctive relief should have been denied, in view of the availability of statutory fines as a remedy to secure compliance; and

[1] The first amendment to the United States constitution provides in part as follows: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, § 5 provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

While we recognize our authority to provide greater protection for freedom of speech under our state constitutional provisions than the United States Supreme Court has found in our federal constitution, we are not persuaded that this case presents an occasion for the exercise of that authority. See *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 57-58, 469 A.2d 1201 (1984). The defendant has not in his brief argued that the textual differences between our state and federal freedom of speech provisions are of any particular significance in this case. Accordingly, our discussion is limited to the federal constitutional provisions.

(4) the court should have awarded the defendant an injunction against the plaintiff as well as damages for the losses he has incurred as a result of the actions of the plaintiff. We find no error.

After his application to the department of transportation for a permit to erect an outdoor advertising sign at Saltonstall Parkway in East Haven had been denied because the sign would have been within 500 feet of an I-95 exit ramp, the defendant nonetheless proceeded to erect the sign at that location without a permit and completed the installation in July, 1986. The sign is supported by a vertical column from which two billboard panels extend to form a V, one facing eastbound and one facing westbound traffic on I-95. The land on which the sign has been erected is owned by Torello Tire Co.,Inc., which sells tires on the premises, and is situated in a commercial or industrial zone of East Haven, in which such signs are permitted. One of the sign panels bears the Torello name and advertises Goodyear tires, which the company sells. The other panel advertises the Chowder Pot Restaurant, which is located several exits south on I-95. Because the regulation prohibiting signs within 500 feet of an interchange contains an exception for those "which advertise . . . activities being conducted upon the real property where the sign is located"; Regs., Conn. State Agencies § 13a-123-7; the plaintiff commissioner concedes the legality of the Torello sign. The restaurant sign, however, does not fall within the exception for on-premises signs, and the trial court, after upholding the validity of the regulations, accordingly ordered its removal.

The defendant also erected a similar sign structure for outdoor advertising on private land adjacent to I-95 situated on Bradley Street in East Haven, after the commissioner had denied his application for a permit. This property also is located in a zone where such a use is permitted. This installation was completed about

the same time as the Saltonstall Parkway sign. One panel bears an advertisement for Red Writer, Inc., a company that conducts no activities on the premises where the sign is located. The other panel contains a picture of the American flag and a statement, "We owe a great debt to Vietnam Vets." The court found that the structure bearing both of these advertisements violated the regulation prohibiting such installations within 500 feet of an interstate highway exit and ordered removal of the entire structure.

I

The regulation relied on by the trial court was issued by the commissioner of transportation pursuant to General Statutes § 13a-123 (c)[2] and provides that "[s]ign structures may not be located within five hundred feet of an interchange . . . ." Regs., Conn. State Agencies § 13a-123-5 (b).[3] It is undisputed that the two East

[2] General Statutes § 13a-123 (c) provides: "The commissioner may promulgate regulations for the control of outdoor advertising structures, signs, displays and devices along interstate highways, the primary system of federal-aid highways and other limited access state highways. Such regulations shall be as, but not more, restrictive than the controls required by Title I of the Highway Beautification Act of 1965 and any amendments thereto with respect to the interstate and primary systems of federal-aid highways or the national standards of the Secretary of Commerce in respect to the intestate highways, in effect November 13, 1958, and any amendments thereto."

[3] Section 13a-123-5 of the Regulations of Connecticut State Agencies provides in part: "(b) Sign structures may not be located within five hundred feet of an interchange or rest area measured along the interstate or limited access primary highway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way. In any case where ramps exist only on one side of the roadway crossed by the above-mentioned highways, the five hundred foot distance shall also be measured from the centerline of the intersected roadway in the opposite direction from the ramps. The distance requirement from an interchange or rest area set forth above shall not apply within the boundaries of a municipality with a population of forty thousand or more according to the 1960 federal census if the state deems such to be consistent with customary use in the area."

Haven sign structures violate the regulation because of their location within the proscribed distance from I-95 interchanges. The defendant attacks the validity of the regulation (1) as creating an unconstitutional restriction on commercial speech and (2) in conjunction with the exception for signs related to the premises on which a sign is located; Regs., Conn. State Agencies § 13a-123-7 (2); as unconstitutionally preferring some signs over others upon the basis of their content.[4]

A

The Chowder Pot Restaurant and the Red Writer advertisements that the court has ordered to be removed fall within the classification of "commercial speech," as the plaintiff concedes. "Prior to 1975 purely commercial advertisements of goods for sale were considered to be outside the protection of the First Amendment." *Metromedia, Inc.* v. *San Diego,* 453 U.S. 490, 505, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981). In *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Counsel,* 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), the United States Supreme Court first plainly held that wholly commercial speech was constitutionally protected. The court invalidated a statute prohibiting pharmacists from advertising prescription drug prices on the ground that it unreasonably interfered with society's strong "interests in the free flow of price information," which the first amendment was designed to advance. Id., 755. "The First Amendment . . . protects commercial speech from unwarranted governmental regulation." *Metromedia, Inc.* v. *San Diego,* supra, 561. "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Id., 563. It has been recognized, however, that "[t]he constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hud-*

son Gas v. *Public Service Commission*, 447 U.S. 557, 562–63, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

The United States Supreme Court has "adopted a four-part test for determining the validity of government restrictions on commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective." *Metromedia, Inc.* v. *San Diego*, supra, 507.

With respect to the first of these criteria, the commissioner has made no claim that the two off-premises commercial advertisements relate to any unlawful activity or are misleading. Accordingly, they qualify for constitutional protection to the extent of its availability for commercial speech.

The defendant maintains that the regulations fail to serve a significant state interest and to advance that interest directly, as the second and third criteria require. The trial court found, however, that "there was substantial evidence that commercial signs at highway interchange areas contribute to accidents." The chief transportation engineer of the department of transportation had testified: " '[I]n interchange areas, especially major highways of this type, the decision-making is very intense at this point. A driver must make up his mind . . . whether [he is] going to exit at that point or . . . going to go forward to a further destination. They have to be concerned about the driver [who] does want to exit but is in the wrong lane and may dart across their path. There are intense areas. Those are the areas that have the greatest amount of accidents on expressways.

Therefore, the regulation asking that the signs not be erected within five hundred feet of these on and off ramps is designed to clear the boards . . . and leave that area as open as possible for intelligent decision-making by the driver . . . .' " This testimony plainly supports the court's finding.

Many courts have concluded that a governmental judgment that highway billboards are traffic hazards is not manifestly unreasonable and should not be set aside. See *E. B. Elliott Advertising Co.* v. *Metropolitan Dade County*, 425 F.2d 1141, 1152 (5th Cir. 1970); *Inhabitants, Town of Boothbay* v. *National Advertising Co.*, 347 A.2d 419, 422 (Me. 1975); *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 180–81, 193 N.E. 799 (1935); *In re Opinion of the Justices*, 103 N.H. 268, 270, 169 A.2d 762 (1961); *Stuckey's Stores, Inc.* v. *O'Cheskey*, 93 N.M. 312, 321, 600 P.2d 258 (1979); *New York State Thruway Authority* v. *Ashley Motor Court, Inc.*, 10 N.Y.2d 151, 155–56, 218 N.Y.S.2d 640, 176 N.E.2d 566 (1961); *Newman Signs, Inc.* v. *Hjelle*, 268 N.W.2d 741, 757 (N.D. 1978); *Ghaster Properties, Inc.* v. *Preston*, 176 Ohio St. 425, 438, 200 N.E.2d 328 (1964); *Lubbock Poster Co.* v. *Lubbock*, 569 S.W.2d 935, 939 (Tex. Civ. App. 1978); *State* v. *Lotze*, 92 Wash. 2d 52, 59, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 100 S. Ct. 257, 62 L. Ed. 2d 177 (1979); *Markham Advertising Co.* v. *Washington*, 73 Wash.2d 405, 420–21, 439 P.2d 248 (1968); but see *John Donnelly & Sons* v. *Campbell*, 639 F.2d 6, 11 (1st Cir. 1980); *Metromedia, Inc.* v. *Des Plaines*, 26 Ill. App. 3d 942, 946, 326 N.E.2d 59 (1975); *State ex rel. Dept. of Transportation* v. *Pile*, 603 P.2d 337, 343 (Okla. 1979). Even at a time when motor vehicles moved more slowly, this court observed that "[highway billboards] may obstruct the view of operators of automobiles on the highway and may distract their attention from their driving. . . ." *Murphy, Inc.* v. *Westport*, 131 Conn.

292, 295, 40 A.2d 177 (1944). "We . . . hesitate to disagree with the accumulated, common-sense judgments of . . . lawmakers and of many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia, Inc.* v. *San Diego,* supra, 509; see *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949).

There can be little doubt that public safety on the highway is a substantial governmental interest. A regulation restricting the location of billboards designed to be seen by motorists traveling at high speeds on a highway such as I-95 by excluding such distractions from especially hazardous areas where vehicles enter or leave the highway may reasonably be viewed as implementing that interest and directly advancing it. The defendant, in attacking this conclusion of the trial court, points to an exception in the regulation providing that "[t]he distance requirement from an interchange . . . shall not apply within the boundaries of a municipality with a population of forty thousand or more according to the 1960 federal census if the state deems such to be consistent with customary use in the area." Regs., Conn. State Agencies § 13a-123-5. According to the defendant, the inapplicability of the regulation to more densely populated towns is an implicit acknowledgment that restricting billboards in such areas, even though traffic hazards are likely to be greater, would improve highway safety only minimally. We do not agree that the failure of the restriction to apply to all municipalities where it would promote traffic safety diminishes its efficacy in advancing that objective in areas where it does apply, such as those involved in this case. Even if the defendant were making an equal protection claim, "[t]here is nothing in the constitution . . . that requires the state to subordinate or compromise its legitimate interests solely to create a more comprehensive program than it already has." *Faraci* v. *Connect-*

icut Light & Power Co., 211 Conn. 166, 172, A.2d (1989). Whatever may be the reasons for excepting more populous areas from the regulation, the omission does not refute the conclusion of the trial court that the regulation does enhance highway safety in the areas where the defendant has been enjoined to remove the signs he has erected in violation of the regulation.

The trial court also found that the regulation satisfied the fourth *Metromedia, Inc.*, criterion, that the restriction reach "no further than necessary to accomplish the given objective"; *Metromedia, Inc.* v. *San Diego*, supra, 507; concluding that the regulation was "narrowly drawn" to achieve "the important objectives of traffic safety and esthetics . . . ."[4] The defendant disputes this conclusion, contending that the restriction leaves open no alternative channels for communication with such a significant audience as the motoring public. He relies upon *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977), in which an ordinance prohibiting on-site "For sale" and "Sold" signs was invalidated because it eliminated a particularly effective medium of commercial speech, leaving only more expensive and less efficient media available. In the present case, however, the restriction cannot be characterized as a complete ban on a standard means of communication, such as outdoor advertising, or an insurmountable barrier to reaching motorists. It is applicable only to signs within 500 feet of interchanges, leaving the remainder of the highway available for outdoor advertising, unless some

[4] The trial court found that the regulation prohibiting billboards near highway interchanges served "the important objectives of traffic safety and esthetics." We limit our discussion to traffic safety, upon which the court primarily relied and upon which substantial evidence was presented at trial. We leave to another time the question of whether esthetic considerations alone would support the validity of a restriction upon billboards located in industrial areas.

other regulation prohibits it. As we have previously noted, the regulation also exempts more populous municipalities from its operation. It applies only to "interstate highways, limited access federal-aid primary highways, the limited access state highways and non-limited access federal-aid primary highways." Regs., Conn. State Agencies § 13a-123-1. The defendant is left free to erect outdoor advertising signs, even off-premises signs, along extensive stretches of our highway system. In true perspective, the restriction imposed by this regulation on the defendant's ability to communicate must be regarded as minimal. We agree with the trial court that it goes no further than necessary to achieve the important governmental purpose of reducing the risk of highway accidents at interchange areas. With respect to his commercial signs, therefore, the defendant has failed to demonstrate that the challenged regulation infringes upon his right of freedom of speech.

B

The remaining sign the defendant was ordered to remove was that containing his statement concerning the debt we owe to veterans of the war in Vietnam. The right to display such a political message falls classically within the protection of the first amendment and any justification for its curtailment must be greater than for a restriction on commercial speech. *Metromedia, Inc.* v. *San Diego,* supra, 506. Nevertheless, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981). Reasonable time, place and manner regulations affecting speech that further significant government interests and are not overbroad have long been upheld as valid. *Grayned* v. *Rockford*, 408 U.S. 104, 115, 92 S. Ct. 2294,

33 L. Ed. 2d 222 (1972). "Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." *Cox* v. *New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 104 (1941).

As we have previously explained, the state's interest in highway safety, especially at the more hazardous interchange areas, is quite substantial. We conclude that it is sufficiently great to justify prohibiting noncommercial billboards within 500 feet of a highway interchange as well as those bearing commercial advertisements. The higher level of state interest required for restrictions on noncommercial speech is adequately met here because of the widespread belief that billboard advertisements, both commercial and noncommercial, are distracting to motorists and threaten public safety in areas where vehicles travel at very high speeds. Indeed, noncommercial messages may be more distracting because they are usually more interesting.

"A major criterion for a valid time, place, and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.' " *Heffron* v. *International Society for Krishna Consciousness, Inc.*, supra, 648, quoting *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 536, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980). The defendant contends that the state's regulatory scheme does not satisfy this standard but favors commercial speech over noncommercial speech by creating the exception in the regulation for on-premises signs that "advertise . . . activities being conducted upon the real property where the signs are located." Regs., Conn. Agencies § 13a-123-7 (2).[5] The language of this provision cor-

[5] Section 13a-123-7 of the Regulations of Connecticut State Agencies provides in part: "Erection and maintenance of the following signs may be

responds closely to the exception contained in General Statutes § 13a-123 (e) (3) for "signs, displays and devices advertising activities conducted on the property on which they are located." The defendant argues that a regulation permitting Torello Tires to advertise the tires it sells on the premises where the sign is located, but preventing the defendant from airing a political opinion unrelated to any activity conducted at the site of the Vietnam veteran sign, is an impermissible content-based restriction on speech. We disagree with this contention.

This court on several occasions has observed that any governmental regulation affecting speech must be content-neutral. *French* v. *Amalgamated Local Union 376*, 203 Conn. 624, 633, 526 A.2d 861 (1987); *Husti* v. *Zuckerman Property Enterprises, Ltd.*, 199 Conn. 575, 581, 508 A.2d 735, appeal dismissed, 479 U.S. 802, 107 S. Ct. 43, 93 L. Ed. 2d 373 (1986); *Friedson* v. *Westport*, 181 Conn. 230, 236, 435 A.2d 17 (1980). The defendant claims that the exception for on-premises signs made by the statute and regulation is equivalent to a preference for commercial signs, because "there is no similar exemption for noncommercial signs." He apparently assumes that no noncommercial signs can be permitted near highway interchanges under the requirement of the regulation that on-premises signs

permitted in protected areas . . . (2) On premises signs: Signs not prohibited by state or local law which are consistent with the applicable provisions of this section and sections 13a-123-4 and 13a-123-13 and which advertise the sale or lease of, or activities being conducted upon, the real property where the signs are located. Not more than one such sign advertising the sale or lease of the same property may be permitted under this section in such a manner as to be visible to traffic proceeding in any one direction on any interstate or federal-aid primary highway. Not more than one such sign, visible to traffic proceeding in any one direction on any one interstate or federal-aid primary highway, and advertising activities being conducted upon the real property where the sign is located, may be permitted under this section more than fifty feet from the advertised activity. Signs permitted under this section may display trade names."

"advertise . . . activities being conducted upon, the real property where the signs are located." We construe the regulation, however, to include in the exception for on-premises signs those relating to noncommercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could also be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit. The exception for on-premises signs, therefore, does not authorize the state to limit in any manner the content of signs erected by those conducting activities on the premises so long as the signs have some reasonable relationship to those activities.

The defendant relies upon *Metromedia, Inc.*, in which a general prohibition against outdoor advertising signs throughout the city contained an on-site sign exemption. This provision permitted on-site signs, defined as those "designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." Id., 494. The court viewed this definition as creating "a broad exception for onsite commercial advertisements, but . . . no similar exception for noncommercial speech," thereby inverting the constitutional priorities. Id., 513. "Insofar as the city tolerates billboards at all, it cannot

choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Id.

Our interpretation of the on-site exception in this case, however, does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements that have some reasonable relationship to an activity conducted thereon. We need not explore the extremes to which advertising signs must go before they can be deemed not to relate to activities being conducted on the premises, because in this case the defendant does not claim that any activity is being carried on at the location of the Vietnam veterans sign.

The defendant also relies upon *Adams Outdoor Advertising* v. *Newport News,* Record No. 880126 (Circuit Court of the City of Newport News, Va., November 18, 1988) in which a municipal ordinance banning off-premises signs, with specified exemptions, but permitting all on-premises signs bearing either commercial or noncommercial messages, was declared unconstitutional. The court, however, appears to have based its decision on the exemptions contained in the statute for various signs, depending upon their content, whether the signs were located on or off the premises, such as directional signs, civic or cultural event signs, and displays used for nonpartisan civic purposes or for opening a new store, business or profession. In *Metromedia, Inc.,* similar exceptions to the general prohibition against outdoor advertising signs were deemed to create a governmental preference for certain varieties of speech based upon content and to render the San Diego ordinance invalid. The defendant has not brought to our attention any exceptions in the regula-

tions involved here that allow signs containing one kind of information but not another. The remaining case relied on by the defendant in which municipal ordinances were invalidated also involved exceptions, based on content, to a general prohibition against outdoor signs and not merely an exception for on-premises signs relating to activities conducted on the premises. *Matthews* v. *Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[n]o political signs are allowed in any district in the Town of Needham; yet such signs as 'For Sale' signs, professional office signs, contractors' advertisements, and signs erected for charitable or religious causes are allowed in all districts").

In *Wheeler* v. *Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied, U.S. 108 S. Ct. 702, L.Ed. 2d , reh. denied, U.S. , 108 S. Ct. 1127, 99 L. Ed. 2d 287 (1988), the court upheld a regulation similar to our § 13a-123-7 (2) that permitted on-premises signs "that contain a message relating to an activity or the sale of a product on the property on which they are located." 603 Ky. Admin. Regs. 3:010, § 2 (3) (1975). The regulation was construed to permit both commercial and noncommercial signs in protected areas so long as the signs relate to activities on the premises. Accordingly, the regulation was deemed to "apply even handedly to commercial and noncommercial speech." *Wheeler* v. *Commissioner of Highways*, supra, 590. The court relied in part upon *Heffron* v. *International Society for Krishna Consciousness, Inc.*, supra, where the United States Supreme Court had upheld a content-neutral prohibition on the sale, exhibition or distribution of materials at a state fair except from fixed locations. "Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized

that the right to advertise an activity conducted on-site is inherent in the ownership or lease of the property." *Wheeler* v. *Commissioner of Highways,* supra, 591; see *Lindmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 93, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977) (suggesting that a prohibition against on-premises "For Sale" signs raises "serious questions . . . as to whether the ordinance 'leave[s] open ample alternative channels for communication.' " [quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)]). The Supreme Court of Washington has reached a conclusion similar to that of *Wheeler,* upholding the allowance of on-premises signs advertising activity conducted on the property where the signs are located as an exception to a general prohibition against signs visible from certain highways. *State* v. *Lotze,* supra.

II

The defendant claims that because he has been enjoined to remove the entire sign structure as well as the Red Writer and Vietnam veteran signs at the Bradley Street location, the injunction constitutes a prior restraint upon his use of the structure to display future messages to the public. He relies upon several cases that have invalidated prohibitions on the publication of certain information or material based upon its content. *Nebraska Press Assn.* v. *Stuart,* 427 U.S. 539, 545, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); *New York Times Co.* v. *United States,* 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). The injunction issued by the trial court is not based upon the content of any message the defendant may wish to put forth, but upon the place he has chosen as a podium. He may disseminate any message, commercial or noncommercial, at some other

place not similarly violative of law. A newspaper publishing company cannot disregard a zoning ordinance and locate its plant in a residential zone on the ground that the restrictions against such a use constitute a prior restraint.

Furthermore, the injunction in this case is no more of a prior restraint than the statute or the regulation that it implements. The regulation, § 13a-123-5 (b), prohibits "sign structures" within 500 feet of an interchange, except for those erected in conjunction with signs relating to on-premises activities. See Regs., Conn. State Agencies § 13a-123-7. In view of our conclusion in part I that the regulation is valid, there is no merit in the defendant's contention that the injunction issued to enforce it is an unconstitutional prior restraint.

III

The defendant's claim that injunctive relief should have been denied because of the availability of fines under General Statutes §§ 13a-123 (j) and 21-63 as enforcement devices relies upon the equitable doctrine that inadequacy of legal remedies is a prerequisite for an injunction. See *Waterbury Teachers Assn.* v. *Civil Service Commission*, 178 Conn. 573, 577–78, 424 A.2d 271 (1979). In *Conservation Commission* v. *Price*, 193 Conn. 414, 429, 479 A.2d 187 (1984), however, we approved the principle that where a statute expressly provides for equitable remedies in addition to the ordinary legal ones, it may be presumed that there is no adequate legal remedy, because the legislature would not have provided the additional remedies if they were not needed. General Statutes § 13a-123 (i)[6] provides

[6] General Statutes § 13a-123 (i) provides: "The commissioner may order the removal of any advertising structure, sign, display or device along any interstate, federal-aid primary, or other limited access state highway erected in violation of this section. Any advertising structure, sign, display or device

that "[t]he commissioner may order the removal of any advertising structure, sign, display or device" erected in violation of § 13a-123 and also authorizes him to remove them at the owner's expense for failure to comply with the removal order.

"It is the court's duty to carry out the intention of the legislature as expressed in the statute it has enacted and to make the remedy it has provided an effective and efficient means of dealing with violations of the act and regulations properly promulgated under its authority." *Conservation Commission* v. *Price*, supra, 430. This does not mean that a court is "mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982). A judge retains a reasonable discretion to decide whether injunctive relief is appropriate even though it is authorized by statute.

Our review of the terms of the injunction issued in this case and the memorandum of decision satisfies us

in existence on September 1, 1965, within six hundred and sixty feet of the right-of-way of any interstate, federal-aid primary, or other limited access state highway may continue to be maintained until July 1, 1970, but may not be replaced or relocated on such highway except in areas where otherwise allowed by statute or regulations adopted thereunder. Any advertising structure, sign, display or device lawfully erected since September 1, 1965, within six hundred sixty feet of the right-of-way of any interstate, federal-aid primary, or other limited access state highway and before June 21, 1967, may continue to be maintained until the end of the fifth year after it becomes nonconforming, but may not be replaced or relocated on such highway except in areas where otherwise allowed by statutes or regulations adopted thereunder. If the person, firm or corporation in control of or owning a structure, sign, display or device or whose name appears thereon does not remove it within fourteen days after an order of removal has been sent to such person, firm or corporation by registered or certified mail, said commissioner may cause such structure, sign, display or device to be removed and the expense of such removal may be collected from the person, firm or corporation owning or controlling the same in an action based on the provisions of this section, or from the sureties on the bond filed by a nonresident person, firm or corporation pursuant to section 21-54."

that the trial court properly exercised its discretion in ordering removal of the Bradley Street sign structure by the defendant. There was no evidence that the structure was likely to be used in the future for any legal purpose, such as advertising some on-premises activity. In the analogous situation of zoning regulation enforcement, the availability of fines as an alternative remedy has been held not to preclude the issuance of an injunction. *Johnson* v. *Murzyn*, 1 Conn. App. 176, 179–81, 469 A.2d 1227, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). The injunction merely implements the order that the statute authorized the commissioner to issue.

IV

It is unnecessary to consider the defendant's claim for an injunction and damages against the commissioner for violation of his constitutional rights, because we have already concluded that no such violation has occurred. It should be noted, however, that any claim for monetary relief would have to be submitted to the claims commissioner pursuant to General Statutes § 4-147.

There is no error.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* PEDRO GRULLON
(13453)

PETERS, C. J., CALLAHAN, GLASS, HULL and SANTANIELLO, Js.

Convicted of the crimes of possession of cocaine with intent to sell by a person who is not drug-dependent and conspiracy to possess cocaine with intent to sell, the defendant appealed. He claimed, inter alia, that the trial court erred in instructing the jury that it could find him guilty of conspiracy on the basis of an agreement he had made to deliver cocaine to a police agent. *Held:*

APPENDIX B

NO. CV-0316430 S

J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION	: SUPERIOR COURT
VS	: JUDICIAL DISTRICT OF HARTFORD-NEW BRITAIN AT HARTFORD
JOHN P. BARRETT d/b/a BARRETT OUTDOOR COMMUNICATIONS	: DECEMBER 15, 1988

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR CLARIFICATION

This court, by its decision of July 28, 1988, ordered the defendant "to remove the Chowder Pot restaurant *sign* at 187 Saltonstall Parkway, East Haven and to remove both *signs* at 28 [sic] Bradley Street, East Haven."

The defendant moved for this court to clarify its decision by making it clear whether the defendant is obligated to remove the messages on the panels or to remove the panels and supporting structures.

The court's decision was addressed to the issue before it, as expressed in the pleadings. The complaint alleges the defendant violated § 21-50 et seq. and § 13a-123 of the General Statutes and regulations promulgated thereunder (RCSA § 13a-123-1, et seq.) by erecting outdoor advertising "signs" without a permit from the plaintiff. Section 21-50 prohibits the erection of "any outdoor advertising structure, device or display" without a permit. Section 13a-123 prohibits the erection of "outdoor advertising structures, signs, displays or devices" within six hundred sixty feet of the edge of an interstate highway, "the advertising message of which is visible

from the main traveled way." The Department of Transportation Regulations, § 13a-123-1 et seq., "apply to the erection and maintenance of outdoor advertising signs, displays and devices." The Regulations define "sign" at § 13a-123-2(h) to mean "any outdoor sign, device, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended or used to advertise or inform, ..."

Although at one point in the trial the Assistant Attorney General waffled on whether she sought removal of the message on the billboards or the billboards themselves, the entire evidence supported the conclusion that the billboard structures diminished highway safety and aesthetics. Thus, this court intended its order to require removal of the *sign structure* at 38 Bradley Street, East Haven. The situation at 187 Saltonstall Parkway, East Haven is more complicated because the sign structure supporting the billboard advertising Torello Tire is legal, while the billboard advertising the Chowder Pot restaurant on that structure violates the statute. Thus, this court orders the removal only of the offending billboard with its advertisements.

In light of this clarification, the defendant is ordered to remove the entire sign structure at 38 Bradley Street, and the billboard or panel advertising the Chowder Pot restaurant at 187 Saltonstall Parkway within thirty days from receipt of this clarifying decision.

/s/ Robert Satter, J.

Robert Satter

APPENDIX C

STATE OF CONNECTICUT

CV-86 31 64 30	SUPERIOR COURT
J. WILLIAM BURNS, COMMISSIONER, of the Department of Transportation, of the State of Connecticut,	JUDICIAL DISTRICT HARTFORD/NEW BRITAIN
vs.	at HARTFORD
JOHN P. BARRETT, DBA, Barrett Outdoor Communications, of Milford, Connecticut.	AUGUST 1, 1988

PRESENT: HONORABLE ROBERT SATTER, SENIOR JUDGE

JUDGMENT

This action in the nature of an action for injunctive relief and seeking a temporary and permanent injunction ordering the removal of signs located at 38 Bradley Street, and 187 Saltonstall Parkway, both in the City of East Haven, Connecticut, and prohibiting construction of said signs, costs of removal of the signs, and an order pursuant to Connecticut General Statutes § 21-63 and § 13a-123(j) requiring the defendant to pay fines, came to this Court on the 13th day of May, 1986 and thence to later dates when the parties appeared and were at issue, as on file, and thence to the present time.

The Court, having heard the parties, finds the issues in favor of the plaintiff.

WHEREUPON, it is adjudged that judgment enter in favor of the plaintiff; that the defendant is ordered, within thirty days from receipt of this decision, to remove the Chowder Pot Restaurant sign at 187 Sattonstall Parkway, East Haven and to remove both signs at 38 Bradley Street, East Haven; that the plaintiff shall arrange to have such signs removed and to collect from the defendant the expense of such removal upon the failure of the defendant to remove the signs; that the defendant is fined one hundred dollars for each sign for a total of three hundred dollars ($300.00).

BY THE COURT,

/s/ Robert Satter

Robert Satter, Senior Judge

APPENDIX D

NO. CV 86-0316429 S	
J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION	: SUPERIOR COURT
V.	: JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
JOHN P. BARRETT d/b/a BARRETT OUTDOOR COMMUNICATIONS	AT HARTFORD
NO. CV 86-0316430 S	: SUPERIOR COURT
J. WILLIAM BURNS, COMMISSIONER OF TRANSPORTATION	: JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
V.	AT HARTFORD
JOHN P. BARRETT d/b/a BARRETT OUTDOOR COMMUNICATIONS	: JULY 28, 1988

MEMORANDUM OF DECISION

This is an action brought by plaintiff J. William Burns, State Commissioner of Transportation, against defendant John P. Barrett, doing business as Barrett Outdoor Communications, seeking an injunction ordering defendant to remove certain outdoor advertising signs at three separate locations, or an order allowing the plaintiff to remove the signs and requiring defendant to pay the cost of removal, and seeking imposition of fines for erection of illegal advertising signs under Conn. General Statutes § 21-63 and § 13-123(j).

The defendant interposes special defenses attacking the constitutionality of the statutes (§ 13a-123, § 21-50 et seq.) and the regulations restricting outdoor advertising, and the constitutionality of the manner of selective and arbitrary enforcement of the statutes and regulations against him. The defendant also counterclaims for the damages he sustained as a result of an *ex parte* temporary injunction issued by the court ordering defendant to cease constructing signs without a state permit.

Although the defendant challenges the facial validity of the Connecticut billboard statute and regulations, he has failed to show that they will have a different impact on the free speech rights of anybody else than they have on him. His challenge is basically to the statutes and regulations as applied to him, and the court, therefore, will limit its analysis of constitutionality to the concrete case before it. *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801–803 (1984). Each sign presents separate factual and constitutional issues.

I.

Sign at Stratford Avenue, Bridgeport

On or about April 19, 1985 defendant applied to plaintiff for permission to erect an off-premises outdoor advertising sign at 226–228 Stratford Avenue, Bridgeport, Connecticut pursuant to § 21-50. The proposed sign was V-type facing both north and southbound traffic on Interstate 95. Plaintiff undertook a field investigation and determined that the proposed sign facing southbound on I-95 was within five hundred feet of other existing and permitted outdoor advertising signs visible from southbound I-95. Accordingly, plaintiff denied defendant's application as violating Department of Transportation regulations. A month later defendant applied for a permit to erect a sign facing northbound on I-95 and plaintiff approved that application. Thereafter, the defendant built

an off-premises advertising sign with panels facing both northbound and southbound. Upon discovering the southbound facing sign erected without a permit, plaintiff ordered defendant to remove it and when defendant failed to do so, plaintiff instituted this action.

Section 13a-123c empowers the plaintiff to promulgate regulations for the control of outdoor advertising signs along interstate highways. Section 13a-123-5 of Regulations of State Agencies provides that in zoned industrial or commercial areas (Stratford Avenue is such an area), "(a) Spacing between sign structures along each side of the highway shall be a minimum of five hundred feet except that this spacing shall not apply to signs which are separated by a building or other obstruction in such a manner that only one sign located within the minimum spacing distance is visible from the highway at any one time." Section 13a-123-2(m) defines "visible" as meaning "capable of being seen, whether or not legible, without aid by a person of normal visual acuity."

There being a conflict in the testimony of plaintiff's and defendant's witnesses as to visibility of other signs within five hundred feet of defendant's southbound sign, this court, with counsel, made an on-site viewing. Proceeding south on I-95, defendant's sign advertising Winston Cigarettes was clearly visible. It extends on a high aluminum column about twenty feet above the left side of the highway. The southbound lane at this point curves to the left. The court would not have noticed two signs to the left, across the northbound lane and a northbound exit ramp and below the level of the highway, unless his attention was directed to them and he turned his head to view them. These signs are in a one-story building facing a local street which runs at an angle to the highway. While these signs can be seen from the highway if one were traveling slowly and looking backward from the southbound direction the car is going, they are not in the normal line of sight from the highway to defendant's Winston sign. They are only obvious when one proceeds down the northbound exit ramp, but then the defendant's sign cannot be seen.

This court concludes from its observation that defendant's sign at Stratford Avenue is the only one visible proceeding south on I-95 and that it does not violate Department sign spacing regulations.

II.

Sign at Saltonstall Parkway, East Haven

On or about March 4, 1985 defendant applied for a permit to erect an outdoor advertising sign with two panels at 187 Saltonstall Parkway, East Haven, Connecticut on premises owned by Torello Tire Co., Inc. The proposed sign was a V-type structure with two bulletins, one facing north and one southbound traffic on I-95. Following a field investigation, defendant determined that the structure was within five hundred feet of an I-95 exit ramp and accordingly denied defendant's application as violative of Department of Transportation regulations. Defendant, nevertheless, started to construct the sign. Plaintiff obtained an *ex parte* temporary injunction to restrain defendant. When that injunction was dissolved, defendant completed the sign. One panel advertises Torello Tires and the other Chowder Pot Restaurant. The restaurant is located several exits south on I-95.

Connecticut Regulations of State Agencies, § 13a-123-5(b) provides: "Sign structures may not be located within five hundred feet of an interchange . . ."[1] It is conceded the sign is within the proscribed distance from the interchange. The Regulations also provide at § 13a-123-7 that certain signs are permitted in protected areas on interstate highways: official signs giving directional and other official information, and

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[1] The regulation also provides: "The distance requirement from an interchange . . . shall not apply within the boundaries of a municipality with a population of forty thousand or more according to the 1960 federal census if the state deems such to be consistent with the customary use in the area." East Haven had a population of 25,028 in 1980, so this exception does not apply.

on-premise signs. The latter are defined as those "which advertise the sale or lease of, or activities being conducted upon the real property where the signs are located. . . . Not more than one such sign, visible to traffic proceeding in any one direction on any one interstate . . . highway, and advertising activities being conducted upon the real property where the sign is located, may be permitted under this section more than fifty feet from the advertised activity. Signs permitted under this section may display trade names."

The plaintiff concedes the legality of the Torello Tire sign because it advertises a business being conducted on premises where the sign is located but demands the removal of the Chowder Pot Restaurant sign because it advertises an off-premises business and so violates the distance requirement of Regulation § 13-123(5)(b).

As early as 1921 Connecticut established a system of regulating outdoor advertising signs along state highways. Public Acts 1921, p. 3092. In 1959 the legislature enacted § 13a-123 et seq. in response to a federal law providing bonus funds for highway construction to states controlling billboards on federally funded and state limited access highways. Among the purposes to be served were traffic safety and preservation of natural beauty.

These sections were amended in 1967 to conform to changes in the 1965 federal Highway Beautification Act. (23 U.S.C. § 131)

Outdoor advertising signs have a dual nature. On the one hand they are large, immobile, and permanent structures which create a unique set of problems for land use planning development. On the other hand, they are means of communication and invoke elements of speech protected by the First Amendment. The government's interest in regulating the non-communicative aspects of billboards must be reconciled with the constitutional right of expression. *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 502 (1981).

While the United States Supreme Court for a long time did not include commercial speech within the mantle of the First Amendment (see, for example, *Valentine v. Christensen*, 316 U.S. 52, 54 (1942)), in 1976 the Court explicitly abandoned that position and held that speech proposing or promoting a commercial transaction was entitled to a measure of constitutional protection. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759-62 (1976). However, the Court has stated, "Commercial and noncommercial communications in the context of the First Amendment have been treated differently." *Metromedia, Inc. v. San Diego*, supra, p. 506. As for commercial speech, the court has adopted a four-part test for governmental restrictions upon it: (1) the commercial speech must concern a lawful activity and not be misleading; if it meets this criterion, then a restriction is only valid if it, (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-66 (1980).

In the leading case of *Metromedia, Inc. v. San Diego*, supra, the court had to determine the constitutionality of a San Diego ordinance banning all outdoor advertising displays within the city, except for on-site commercial advertising and twelve other very limited exceptions. With respect to the ordinance's application to commercial billboards, the plurality opinion of the court recognized that the objectives of traffic safety and maintaining the appearance of the city "are substantial governmental goals." (pp. 507-8) The plurality opinion also held that the ordinance directly advances those goals, although the concurring opinion of Justices Brennan and Blackmun would require more evidence on this point.

In the case before this court, there was substantial evidence that commercial signs at highway interchange areas contribute to accidents. The chief transportation engineer for the department of transportation testified: ". . . in inter-

change areas, especially major highways of this type, the decision-making is very intense at this point. A driver must make up his mind, his or her mind, whether they are going to exit at that point or they are going to go forward to a further destination. They have to be concerned about the driver that does want to exit but is in the wrong lane and may dart across their path.

"There are intense areas. Those are the areas that have the greatest amount of accidents on expressways.

"Therefore, the regulation asking that the signs not be erected within five hundred feet of these on and off ramps is designed to clear the boards, as you will, and leave that area as open as possible for intelligent decision-making by the driver . . .".

This court further finds that the five hundred feet protected area reaches no farther than necessary to accomplish the twin goals of safety and esthetics.

The defendant argues that these goals are denigrated by the state permitting on-site advertising within the protected area. A number of justifications have been advanced for the exception: off-site advertising signs periodically change their content more often, creating a more acute problem (*Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 110 (1949); on-site signs are "in actuality a part of the business itself, just as the structure housing the business is a part of it . . .", *United Advertising Corp. v. Borough of Raritan,* 93 A. 362, 365 (N.J. 1952); an on-site exception is self-limiting since the sign is required to relate to an activity on the premises; and the state may "reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the product or services there than it has in using or leasing its available space for the purposes of advancing commercial enterprise located elsewhere." *Metromedia, Inc. v. San Diego,* supra, p. 512.

In this case the evidence was that on-site advertising within interchanges, while distracting, was less so and less of a traffic hazard than off-site advertising.

This court concludes, as did the United States Supreme Court in *Metromedia*, that "offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." (p. 512) See the cases cited in *Metromedia* at p. 511 sustaining the distinction between off-site and on-site advertising. See also *Spannaus v. Hopf*, 323 N.W.2d 746 (Minn. 1982). To the same effect is *Murphy, Inc. v. Westport*, 131 Conn. 292, 303–05 (1944).

Thus, this court finds that the Regulation barring commercial signs within five hundred feet of an interchange are constitutionally valid and that defendant's off-premises sign advertising the Chowder Pot Restaurant violates that Regulation.

III.

Sign at Bradley Street, East Haven

On or about March 4, 1985, defendant applied for a permit for off-premises outdoor advertising signs at 38 Bradley Street, East Haven, Connecticut. The proposed sign was to be a V-type ground structure with two panels, one facing north and one southbound on I-95, located on an empty piece of land. Following a field investigation, plaintiff determined that the structure was within five hundred feet of an I-95 exit ramp and accordingly denied the application as violative of Regulation 13a-123-5(b). Defendant, nevertheless started to construct the sign. Plaintiff obtained an *ex parte* temporary injunction to restrain defendant. When that injunction was denied, defendant completed the sign. One panel advertises Red Writer and the other has the American flag and the message, "We owe a great debt to Vietnam Vets."

The facts are undisputed that the sign is within the protected area of an interchange and does not advertise "activities being conducted upon the real property where the signs are located." Regulation 13a-123-7. Defendant, however, contends that at least the Vietnam Vets message is an exercise of free speech protected by the First Amendment of the United States Constitution and Article I, § 5 of the Connecticut Constitution.

The constitutional right of free speech "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. International Society for Krisna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). That case upheld a restriction confining adherents of the Krisna religion to selling or distributing their wares at a fixed location within state fair grounds. Similarly, in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) the court upheld a city ordinance prohibiting posting signs on public property as a content-neutral restriction designed to prevent visual clutter.

The general rule is that any form of expression, whether oral, written or symbolic conduct can be constitutionally limited only by reasonable time, place and manner restrictions. As the United States Supreme Court said in *Clark v. Committee for Creative Non-Violence*, 468 U.S. 288, 293 (1984):

"We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

This court has above found that the Regulations prohibiting billboards within five hundred feet of highway interchanges serve the important objectives of traffic safety and esthetics and they are narrowly drawn to achieve those

objectives. Moreover, the Regulations not only leave unaffected many communications media other than outdoor advertising signs (such as radio, television, newspapers, leaflets, etc.), but also allow outdoor advertising signs in a wide variety of other locations. In fact the defendant himself testified to numerous idealogical messages he has proclaimed on outdoor advertising signs in authorized locations.

Finally, as the Regulations are here applied at 38 Bradley Street, they are content-neutral. The panel advertising Red Writer and the panel stating the patriotic message are both violative of the Regulations, without distinction as to commercial or noncommercial communications.

Metromedia is distinguishable precisely on this point. In that case the United States Supreme Court held the San Diego ordinance which banned virtually all billboards, with the notable exception of on-site commercial advertising, to be violative of the First Amendment because by that exception it favored commercial speech over noncommercial speech. The Court said, at page 513:

> "As indicated above, our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech. San Diego effectively inverts this judgment by affording a greater degree of protection to commercial than to noncommercial speech. There is a broad exception for onsite commercial advertisement, but there is no similar exception for noncommercial speech. The use of onsite billboards to carry commercial messages relative to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited . . . Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages: the city may not conclude that the

communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages."

In the instant case, if the Vietnam Vets message was placed on the sign at Saltonstall Parkway, where the Torello Tire advertisement is permitted, there would be presented the issue dealt with in *Metromedia*. But since the sign at Bradley Street is not relative to any on-site activity and is within the protected area of the interchange, both panels, without regard to their content, are violative of the Regulations.

The defendant would have this court declare the Connecticut statutes, § 13a-123 et seq. and § 21-50 et seq. and the pertinent Regulations of State Agencies unconstitutional because the on-site commercial advertising exception raises the possibility of favoring commercial speech over noncommercial speech under the *Metromedia* analysis. This has been the approach of the courts of some states, such as the Ohio Supreme Court in *Norton Outdoor Advertising v. Arlington Heights*, 433 N.E.2d 198 (1982). But the better wisdom is to apply constitutional principles to the facts of the case before the court. Here the facts as to the outdoor advertising signs at Saltonstall Parkway and Bradley Street, East Haven, Connecticut do not establish a basis for declaring Connecticut's regulation of billboards unconstitutional.

V.

Defendant interposed a special defense with respect to the Bridgeport sign that plaintiff unconstitutionally discriminated against him by enforcing the statute and regulations against him in an arbitrary and selective manner. He introduced into evidence photographs of a number of signs in the Bridgeport and New Haven area which violate the same

five hundred foot spacing regulation (Reg. § 13a-123-5(a)) which plaintiff claims defendant's Bridgeport sign violates.

In the leading case of *Wayte v. United States,* 470 U.S. 557 (1985) the United States Supreme Court held that claims of selective or arbitrary enforcement are "judge[d] . . . according to ordinary equal protection standards" (p. 608), and in the absence of a facially discriminatory law, the plaintiff must show that the challenged application of the law has a discriminatory effect and is motivated by a discriminatory purpose.

The short answer is that this defense is moot because this court has found defendant's Bridgeport sign not in violation of the law and regulations. The better answer is that plaintiff proceeded against defendant because he put up the sign after being denied a permit. There is no showing in this case that plaintiff acted with discriminatory intent against defendant.

VI.

Defendant asserts that permanent injunction should not be granted because plaintiff has failed to prove irreparable harm and no adequate remedy at law.

When a statute and state regulations have been violated, the plaintiff seeking an injunction is relieved of the burden of alleging and proving irreparable harm and no adequate remedy at law under the rationale that "the enactment of the statute by implication assumes that no adequate alternative remedy exists and that the injury was irreparable, that is, the legislation was needed or else it would not have been enacted." *Conservation Commission v. Price,* 193 Conn. 414, 429 (1984) quoting *Crabtree v. Van Hise,* 39 Conn. Sup. 334 (1983).

Conn. Gen. Statutes § 13a-123(i) grants the power to the Commission of Transportation to "order the removal of any advertising structure, sign, display or device along any interstate . . . highway erected in violation of this section." If it is not removed, the commissioner "may *cause* such structure, sign, display or device to be removed and the expense of such removal may be collected . . . *in an action* based on the provisions of this section, . . . (underlining added)

The statute clearly authorizes the plaintiff to seek an injunction to effectuate removal of offending billboards.

Finally, defendant argues that the two statutes, §§ 13a-123(j) and 21-63, imposing a fine of not more than one hundred dollars for each violation, constitute an adequate legal remedy. There is no merit to this defense. This court reads § 13a-123, empowering the commissioner to undertake legal action to "cause" removal of a sign, and §§ 13a-123(j) and 21-63, imposing a fine, to be correlative and not mutually exclusive. Under this statutory scheme the court can both issue an injunction and impose a fine.

VII.

Based on the foregoing this court herewith issues an injunction ordering the defendant, within thirty days from receipt of this decision, to remove the Chowder Pot Restaurant sign at 187 Saltonstall Parkway, East Haven and to remove both signs at 38 Bradley Street, East Haven. If defendant shall fail to do so; the defendant having already been given the requisite fourteen-day notice, the plaintiff may arrange to have such signs removed and to collect from the defendant the expense of such removal. Also, because all three signs are in violation of the law, and particularly because defendant deliberately erected them after having been denied a permit, this court fines the defendant one hundred dollars for each sign, or a total of three hundred dollars ($300.00).

There being no merit to defendant's counterclaim, judgment in favor of plaintiff is entered on it.

/s/ Robert Satter, J.

Robert Satter

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or at the press, or the right of the people peacefully to assemble.

23 U.S.C. § 131

(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which

standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in

this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

(m) There is authorized to be appropriated to carry out the provisions of this section, out of money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, not to exceed $2,000,000 for the fiscal year ending June 30, 1970, not to exceed $27,000,000 for the fiscal year ending June 30, 1971, not to exceed $20,500,000 for the fiscal year ending June 30, 1972, and not to exceed $50,000,000 for the fiscal year ending June 30, 1973. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967.

(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

(o) The Secretary may approve the request of a State to permit retention in specific areas defined by such State of directional signs, displays, and devices lawfully erected under State law in force at the time of their erection which do not conform to the requirements of subsection (c), where such signs, displays, and devices are in existence on the date of enactment of this subsection and where the State demonstrates that such signs, displays and devices (1) provide directional information about goods and services in the interest of the traveling public, and (2) are such that removal would work a substantial economic hardship in such defined area.

(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974 which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is required to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).

(q)(1) During the implementation of State laws enacted to comply with the section, the Secretary shall encourage and assist the States to develop sign controls and programs which will assure that necessary directional information about facilities providing goods and services in the interest of the traveling public will continue to be available to motorists. To this end the Secretary shall restudy and revise as appropriate existing standards for directional signs authorized under subsections 131(c)(1) and 131(f) to develop signs which are functional and esthetically compatible with their surroundings. He shall employ the resources of other Federal departments and agencies, including the National Endowment for the Arts, and employ maximum participation of private industry in the development of standards and systems of signs developed for these purposes.

(2) Among other things the Secretary shall encourage States to adopt programs to assure that removal of signs providing necessary directional information, which also were providing directional information on June 1, 1972, about facilities in the interest of the traveling public, be deferred until all other nonconforming signs are removed.

Conn. Gen. Stat. § 13a-123

(e) The following types of signs, displays and devices may, with the approval of and subject to regulations promulgated by the commissioner, be permitted within the six hundred sixty-foot area of interstate, primary and other limited access state highways, except as prohibited by state statute, local ordinance or zoning regulation: (1) Directional and other official signs or notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders and scenic and historical attractions which are required or authorized by law; (2) signs, displays and devices advertising the sale or lease of the property upon which they are located; (3) signs, displays and devices advertising activities conducted on the property on which they are located.

Subject to regulations promulgated by the commissioner and except as prohibited by state statute, local ordinance or zoning regulation signs, displays and devices may be erected and maintained within six hundred and sixty feet of primary and other limited access state highways in areas which are zoned for industrial or commercial use under authority of law or located in unzoned commercial or industrial areas which areas shall be determined from actual land uses and defined by regulations of the commissioner. The regulations of the commissioner in regard to size, spacing and lighting shall apply to any segments of the interstate system which traverse commercial or industrial zones wherein the use of real property adjacent to the interstate system is subject to municipal regulation or control, or which traverse other areas where the land use, as of September 21, 1959, was clearly established under state law as industrial or commercial.

(j) Any person violating any provision of this section shall be fined not more than one hundred dollars for each such violation.

Conn. Gen. Stat. § 21-50

Sec. 21-50. Permit for structure. No person, firm or corporation shall erect or maintain any outdoor advertising structure, device or display until a permit for the erection of such structure, device or display has been obtained from the commissioner of transportation. Application for such permit shall be in writing, signed by the applicant or his authorized agent, upon blanks furnished by the commissioner in such form and requiring such information as he prescribes. Each application shall have attached thereto the written consent of the owners of the property on which such structure, device or display is to be erected or maintained. Each application shall be accompanied by a fee as provided in subsection (a) of section 21-52. The fee for such permit shall be as provided in subsection (b) of said section and shall be payable upon the granting of such permit and annually thereafter on the first day of August.

Conn. Gen. Stat. § 21-63

Sec. 21-63. Penalty. Any person who erects, maintains, displays or allows to remain in view an advertisement, sign or billboard or any structure designed for the display of advertising matter contrary to any provision of this chapter shall be fined not more than one hundred dollars for each sign so displayed.

Conn. Agencies Regs. § 13a-123-1

Applicability. Sections 13a-123-1 to 13a-123-14 inclusive, apply to the erection and maintenance of outdoor advertising signs, displays, and devices within six hundred sixty feet of the edge of the right-of-way, the advertising message of which is visible from the main traveled way of any portion of the national system of interstate and defense highways, hereinafter referred to as interstate highways, limited access federal-aid primary highways, other limited access state highways and non-limited access federal-aid primary highways. (Effective March 19, 1968.)

Conn. Agencies Regs. § 13a-123-4

Signs prohibited in protected areas. Erection and maintenance of the following signs is not permitted in protected areas: (a) Signs advertising activities that are illegal, under state, federal or local laws or regulations in effect at the location of such signs or at the location of such activities; (b) obsolete signs; (c) signs that are not clean and in good repair; (d) signs that are not securely affixed to a substantial structure; (e) signs that are prohibited by state statutes or local ordinances or zoning regulations; (f) signs that are not consistent with the provisions of chapter 411 of the general statutes. (Effective March 19, 1968.)

Conn. Agencies Regs. § 13a-123-5

Protected areas and spacing of signs adjacent to interstate and limited access primary highways. No signs except as otherwise permitted herein will be allowed within six hundred and sixty feet of the nearest edge of the right-of-way except in areas zoned industrial or commercial and in actual use as such as determined by the commissioner of transportation or which is an unzoned industrial or commercial area as defined in section 13a-123-2. Signs in zoned industrial or commercial areas in actual use and in unzoned industrial or commercial areas which are permitted shall be subject to the following spacing requirements and be consistent with the applicable provisions of this section and sections 13a-123-4 and 13a-123-13. (a) Spacing between sign structures along each side of the highway shall be a minimum of five hundred feet except that this spacing shall not apply to signs which are separated by a building or other obstruction in such a manner that only one sign located within the minimum spacing distance set forth above is visible from the highway at any one time. (b) Sign structures may not be located within five hundred feet of an interchange or rest area measured along the interstate or limited access primary highway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main traveled way. In any case where ramps exist only on one side of the roadway crossed by the above-mentioned highways, the five hundred foot distance shall also be measured from the centerline of the intersected roadway in the opposite direction from the ramps. The distance requirement from an interchange or rest area set forth above shall not apply within the boundaries of a municipality with a population of forty thousand or more according to the 1960 federal census if the state deems such to be consistent with customary use in the area. (Effective March 19, 1968.)

Conn. Agencies Regs. § 13a-123-7

Signs permitted in protected areas on the interstate and federal-aid primary limited and non-limited access highways. Erection and maintenance of the following signs may be permitted in protected areas:

(1) Official signs: Directional or other official signs or notices erected and maintained by public officers or agencies pursuant to and in accordance with direction or authorization contained in state or federal law, for the purpose of carrying out an official duty or responsibility.

(2) On premises signs: Signs not prohibited by state or local law which are consistent with the applicable provisions of this section and sections 13a-123-4 and 13a-123-13 and which advertise the sale or lease of, or activities being conducted upon, the real property where the signs are located. Not more than one such sign advertising the sale or lease of the same property may be permitted under this section in such a manner as to be visible to traffic proceeding in any one direction on any interstate or federal-aid primary highway. Not more than one such sign, visible to traffic proceeding in any one direction on any one interstate or federal-aid primary highway, and advertising activities being conducted upon the real property where the sign is located, may be permitted under this section more than fifty feet from the advertised activity. Signs permitted under this section may display trade names. (Effective March 19, 1968.)

Conn. Agencies Regs. § 13a-123-13

General provisions

(a) The following signs shall not be permitted: (1) Signs which imitate or resemble any official traffic sign, signal or device, (2) signs which are erected or maintained upon trees or painted or drawn upon rocks or other natural features,

(3) signs which are erected or maintained in such a manner as to obscure, or otherwise interfere with the effectiveness of an official traffic sign, signal or device, or obstruct or interfere with the driver's view of approaching, merging or intersecting traffic, (4) signs which have a movable advertising face permitting a modification, change or alternate in whole or in part in the advertising message contained on the sign.

(b) If any commercial or industrial activity, which has been used in defining or delineating an unzoned commercial or industrial area, ceases to operate for a period of six continuous months, any sign located within the former unzoned area shall be removed unless said sign is within five hundred feet of any other commercial or industrial activity.

(c) Size of signs: No sign shall exceed the following dimensions:

(1) Maximum area — nine hundred square feet.

(2) Maximum height — twenty-five feet.

(3) Maximum length — sixty feet.

The area shall be measured by the outer limits of the advertising space. A sign structure may contain one or two advertisements facing in the same direction, provided the total area of all advertising space shall not exceed the maximum area. Back-to-back or V-type sign structures will be permitted with the maximum area being allowed for each facing; and considered as one structure.

(d) Lighting:

(1) All signs may be illuminated.

(2) All signs must be shielded so as to prevent from being directed to any portion of the traveled way of the highway beams or rays of light which are of such intensity or brilliance as to cause glare or to impair the vision of the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle.

(3) Signs which contain, include or are illuminated by any flashing intermittent or moving light or lights are prohibited, except those giving public service information such as time, date, temperature, weather or similar information.

(Effective December 7, 1972)

APPENDIX F

SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
AT HARTFORD

WILLIAM J. BURNS,
Plaintiff,

vs. No. 316430

JOHN T. BARRETT,
Defendant.

August 29, 1986

WILLIAM J. BURNS,
Plaintiff,

vs. No. 316429

JOHN T. BARRETT,
Defendant.

Before:
HONORABLE ROBERT SATTER

Appearances:

For the Plaintiff:
GERARD DOWLING, ESQUIRE
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

For the Defendant:
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut
By: JAMES WADE, ESQUIRE

Patricia L. Masi
Court Reporter

* * *

application — isn't the situation this? When he makes an application it's an application for an advertising sign?

MR. WADE: Structure.

THE COURT: For a structure on which an advertising sign is going to be placed.

THE WITNESS: That's correct.

THE COURT: So even though the — if the application implies the intent to put the advertising message on the structure — if he didn't have the intent to put an advertising message on that structure, then he wouldn't have to come to you.

THE WITNESS: That's correct. Our application is for an off premise sign.

BY MR. WADE:

Q I understand. In other words, you're saying that as the judge said, you feel that because of the fact that he's putting up this structure on which advertising signs could be hung, that implicit in that must be some intent to hang advertising messages on it?

A Mr. Barrett applied for an outdoor premises advertising sign at that location.

Q That's correct. And you turned it down?

A That's correct.

Q Then he went ahead and built it anyway?

A That's correct.

* * *

SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
AT HARTFORD

WILLIAM J. BURNS,
Plaintiff,

vs NO. 316429

JOHN T. BARRETT,
Defendant.

FEBRUARY 19, 1987

WILLIAM J. BURNS,
Plaintiff,

vs NO. 316430

JOHN T. BARRETT,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before:
The Honorable ROBERT SATTER, Judge

Appearances:

Representing the Plaintiff:
KATHRYN MOBLEY, ESQ.
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

Representing the Defendant:
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
By: JAMES A. WADE, ESQ.

Marcia M. Allen
Court Reporter

* * *
intends to display a sign, okay?

MS. MOBLEY: Yes, your Honor.

THE COURT: He applies for a permit. If you deny the permit, is the consequence of the denial he can't put up the structure as well as put up the sign?

MS. MOBLEY: The practical effect is that he will not put up a structure.

THE COURT: I'm not asking you that. He may have a desire to build some crazy architectural scheme.

MS. MOBLEY: I believe at that point he could go ahead and put up a structure, your Honor.

THE COURT: Really? Is that the way you interpret the statute?

MS. MOBLEY: Yes, your Honor.

MR. WADE: And I agree with that. And that was the testimony — you may not recall it, your Honor, but that was Mr. Staron's testimony way back when. And you'll have the transcript.

You may recall my examination of him when I took him through a variety of hypotheticals, such as putting the alphabet on, putting crazy mixed-up letters. He said that certain of those would produce, in his opinion, jurisdiction and certain would not. You may recall I asked him certain hypotheticals about putting beach chairs up on the structure and holding a cocktail party there. Do you remember that?

THE COURT: Yes.

MR. WADE: And he acknowledged that they would not have jurisdiction if that occurred.

Another factor that your Honor has to take into account when you ask that question is that not infrequently the structure on which the off-premises sign is painted is a building which may happen to be in the effected zone. And the person who constructs the building may later on decide that there's a nice brick face on that that would make an opportune place for the sign. We have to go to the DOT and get permission to put that message on there.

We can argue at a later date the point you're raising but you've touched on a very sensitive issue here.

And I think that Mrs. Mobley and I agree that assuming that we get our local zoning and building permit authorizations, that we can build a structure. And then the issue becomes, having done that, what obligations do we have, vis-a-vis the DOT, to put the message on it.

THE COURT: All right.

MR. WADE: And that's why the First Amendment enters into this.

THE COURT: I interrupted you, Mrs. Mobley. You were asking him a constitutional question. Do you want to have it read back?

MS. MOBLEY: Yes. I believe Attorney Wade ***

SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN
AT HARTFORD

WILLIAM J. BURNS,
Plaintiff,

vs NO. 316429

JOHN T. BARRETT,
Defendant.

FEBRUARY 20, 1987

WILLIAM J. BURNS,
Plaintiff,

vs NO. 316430

JOHN T. BARRETT,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before:
The Honorable ROBERT SATTER, Judge

Appearances:

Representing the Plaintiff:
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Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

Representing the Defendant:
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
By: JAMES A. WADE, ESQ.

Marcia M. Allen
Court Reporter

* * *
structure to be erected?

A No, sir, I don't know that.

Q You're not aware of that?

MS. MOBLEY: Object, your Honor. That was outside the direct examination.

MR. WADE: I think I'm probing his expert opinion. I should be given some leeway here, your Honor, as to what he formulates his opinion on.

THE COURT: The objection is overruled. I'll allow the question.

MS. MOBLEY: Exception, your Honor.

THE COURT: That's a very helpful basis for objection but this time I'm going to overrule it.

BY MR. WADE:

Q If you accept my representation to you, Dr. Gubala, that the structure itself was given — was permitted by the local zoning and building authorities — would you accept that for the moment for purposes of our discussion?

A Certainly.

Q All right. Now, given the fact that the structure itself has been permitted by local authorities, if no message of any kind were printed on the faces of those — of that structure, would it, in your opinion, be equally as unsafe as it is with a message written on it?

A I would say yes, it would be distracting because I, as a driver, would be wondering why isn't there something on that very expensive steel structure.

Q Sure. But assuming — so your opinion is that the structure itself is unsafe and a distraction to the driver, right?

A It's a massive structure poking out of the landscape, obviously a sign support structure. And I, as a driver, and I think many other drivers would say, "When is something going to go up on that thing?" And they would be checking it everyday and perhaps missing the guy putting on his breaks in front of him.

Q And you would concede, would you not, that if that structure were built and no message were painted on that sign, your department would have no jurisdiction whatsoever to say anything about that structure, would you?

A It might become such a curiosity or a hazard that we might have to get into it as an impediment of safe highway flow if we have statutes in that area.

Q Sure. If you have statutes in that area or if it rose to the level of becoming a nuisance, you might be able to take some sort of action, vis-a-vis that structure, right?

A Yes, sir.

Q In order to do that, establish it to have risen to that level, would you have to keep some sort of data on accidents occurring at or about the site of that sign or that ***

No. 89-636

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS,
COMMISSIONER OF TRANSPORTATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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No. 89-636

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

JOHN P. BARRETT d/b/a
BARRETT OUTDOOR COMMUNICATIONS,
Petitioner,

v.

J. WILLIAM BURNS,
COMMISSIONER OF TRANSPORTATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

The respondent, J. William Burns, Commissioner of Transportation for the State of Connecticut, prays that a writ of certiorari, as requested by the petitioner, John P. Barrett d/b/a Barrett Outdoor Communications, not be issued to review the judgment of the Connecticut Supreme Court rendered on July 18, 1989.

STATEMENT OF THE CASE

In this case, the Connecticut Supreme Court upheld the decision of the Connecticut Superior Court ordering the removal of three outdoor advertising sign faces and supporting structures at two locations owned by the petitioner in East Haven, Connecticut pursuant to Connecticut Department of Transportation ("ConnDOT") Regulation § 13a-123-5(b), which prohibits, except in certain narrowly defined circumstances, the placement of such signs within 500 feet of an interstate highway interchange. *J. William Burns, Commissioner of Transportation v. John P. Barrett*, 212 Conn. 176, 561 A.2d 1378 (1989). The Connecticut Supreme Court held that this regulation was narrowly drawn to serve the State's interest in highway safety, and, therefore, did not violate the First Amendment to the United States Constitution. *Id.* In addition, the Connecticut Supreme Court held that the regulation was content-neutral, and, accordingly, did not violate the First Amendment to the United States Constitution. *Id.* As to the facts of this case, respondent refers this Court to the text of the Connecticut Supreme Court's decision. *Id.*

The respondent takes strong exception to the petitioner's assertion at page 15 of its Brief that the regulation in question regulates only signs and not the structure holding one or more signs. The petitioner states at page 15 of its Brief:

> In fact, the respondent, in effect, admitted that safety is not an issue in this case. At the hearing, the respondent conceded that the structures are legal and that the respondent is not attempting to regulate the structures or to have them taken down. (8/29/86 transcript at 142; 2/19/87 transcript at 30–31). The petitioner therefore could conceivably leave an empty structure in place, or even use it for a party, as the petitioner facetiously suggested at the hearing. The respondent conceded that it would not have any authority to prohibit such a use or to have the structure removed as long as the petitioner did not place a

> sign on the structure. In making these concessions, the respondent effectively admitted that enforcement of the regulations in question in these instances would not further its interest in safety. The respondent cannot reasonably argue that the structures would be more of a distraction with signs than without signs. Mr. Gubala, the state's safety expert, in fact, admitted that a structure without a sign could be an even greater distraction and safety hazard to drivers than it would be with a sign. (2/20/87 transcript at 28–29). In light of these concessions by the respondent, the Connecticut Supreme Court's ruling that the statute was narrowly drawn to meet safety interests is clearly erroneous.

Petitioner's Brief at page 15.

Petitioner raised the same claim before the Connecticut Superior Court in its Request for Clarification dated August 16, 1988, of the meaning of the word "sign," that is, does the word "sign" include the structure supporting the message? (See Connecticut Supreme Court Record ("R") at 36–46). The Superior Court, after reviewing the pleadings, the statutes and the regulations defining "sign" stated:

> Although at one point in the trial the Assistant Attorney General waffled on whether she sought removal of the message on the billboards or the billboards themselves, the entire evidence supported the conclusion that the billboard structures diminished highway safety and aesthetics. Thus, this Court intended its order to require removal of the *sign structure* at 38 Bradley Street, East Haven. (Emphasis in original).

(R at 58). Additionally, the testimony of the State's witness was that the permit was for the structure. (Tr. 8-29-86, p. 138; R at 51). Furthermore, earlier in the colloquy between the trial court and the State's counsel where the Assistant Attorney

General "waffled," counsel stated that the structure was subject to the regulations. (Tr. 2-19-87, pp. 26–31 (Appendix to Respondent's Brief in the Connecticut Supreme Court ("PA") at 67–72)). Respondent's witness and respondent counsel also made it clear that the sign clearly included the supporting structure for the message. (Tr. 2-18-87, pp. 148–154 (PA at 44–50)).

The petitioner in its Brief at page 20 erroneously contends that Connecticut statutes and regulations permit on-site commercial signs, but do not allow on-site non-commercial signs. The petitioner in its Brief at page 20 states:

> The regulations and statutes in issue here create such a "peculiar inversion" for they too permit commercial speech where non-commercial messages are not allowed. For example, C.G.S. § 13a-123(e) and Conn. Agencies Regs. § 13a-123-7 exempt on-site commercial signs from the prohibition against signs within 500 feet of another sign or an exit ramp. A non-commercial sign, however, is not permitted in these areas for there is no similar exemption for non-commercial signs. Such a statute is obviously contrary to the holding of Metromedia and its progeny for it impermissibly distinguishes between two different types of speech based on content and favors commercial speech over non-commercial speech. See *Matthews,* 764 F.2d at 60 (ordinance distinguishing between commercial and non-commercial speech impermissibly distinguishes on basis of content). This statutory scheme is unconstitutional on its face in that it prevents the defendant from displaying political and ideological messages which it has traditionally conveyed while allowing signs for commercial goods and services. *Id.* at 61 (ordinance favoring commercial over non-commercial speech unconstitutional on its face).

Petitioner's Brief at Page 20.

The Connecticut Supreme Court, however, expressly stated that Connecticut regulations and statutes permit on-site non-commercial signs:

> This court on several occasions has observed that any governmental regulation affecting speech must be content-neutral. *French v. Amalgamated Local Union 376,* 203 Conn. 624, 633, 526 A.2d 861 (1987); *Husti v. Zuckerman Property Enterprises, Ltd.,* 199 Conn. 575, 581, 508 A.2d 735, appeal dismissed, 479 U.S. 802, 107 S.Ct. 43, 93 L.Ed.2d 373 (1986); *Friedson v. Westport,* 181 Conn. 230, 236, 435 A.2d 17 (1980). The defendant claims that the exception for on-premises signs made by the statute and regulation is equivalent to a preference for commercial signs, because "there is no similar exemption for noncommercial signs." He apparently assumes that no noncommercial signs can be permitted near highway interchanges under the requirement of the regulation that on-premises signs "advertise . . . activities being conducted upon, the real property where the signs are located." We construe the regulation, however, to include in the exception for on-premises signs those relating to noncommercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could also be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit. The exception for on-premises signs, therefore, does not authorize the state

> to limit in any manner the content of signs erected by those conducting activities on the premises so long as the signs have some reasonable relationship to those activities.
>
> . . .
>
> Our interpretation of the on-site exception in this case, however, does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements that have some reasonable relationship to an activity conducted thereon. We need not explore the extremes to which advertising signs must go before they can be deemed not to relate to activities being conducted on the premises, because in this case the defendant does not claim that any activity is being carried on at the location of the Vietnam veterans sign.

Burns v. Barrett, supra, 212 Conn. at 188–190, 561 A.2d at 1384–1385.

It is important to observe that there is no conflict among the federal or state courts regarding the type of statutes and regulations at issue in the case. In the only two cases involving regulations or statutes similar to those at issue in Connecticut, the courts upheld their validity against constitutional challenge. *Wheeler v. Commissioner of Highways,* 822 F.2d 586 (6th Cir. 1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988); and *State v. Lotze,* 92 Wash.2d 52, 593 P.2d 811, *appeal dismissed,* 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979). Accordingly, the Petition for a Writ of Certiorari should be denied.

REASONS FOR NOT GRANTING THE WRIT

I. THE CONNECTICUT SUPREME COURT DID NOT ERR IN CONCLUDING THAT THE STATUTES AND REGULATIONS IN ISSUE ARE NARROWLY DRAWN TO SERVE A SIGNIFICANT GOVERNMENTAL PURPOSE AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is noteworthy that the petitioner does not claim that there is a conflict among the Circuit Courts of Appeal regarding the issues in this case, or that there are any new constitutional issues raised here. In essence, the petitioner is arguing that there were insufficient facts to support the conclusion of the Connecticut Supreme Court that a ConnDOT regulation prohibiting signs *and* structures within 500 feet of highway interchanges was narrowly tailored to achieve the important governmental goal of promoting highway safety. (*See* Petitioner's Brief at pages 11–17). This Court does not ordinarily grant a writ of certiorari to review possible factual errors. Supreme Court Rule 17.1 sets forth the considerations governing review on certiorari:

> Rule 17. Considerations governing review on certiorari
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from

the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

None of the considerations listed in Supreme Court Rule 17 are present in this case.

In any case, there was substantial evidence supporting the Connecticut Supreme Court's holding that the statutes and regulations in issue are narrowly drawn to serve the State's significant governmental interest in promoting highway safety. As is discussed in the Statement of the Case, the petitioner's contention that safety was not an issue in the case because the regulation applied only to the sign itself and not the structure holding the sign is totally false. (*See* Petitioner's Brief at page 15). The Superior Court "intended its order to require removal of the *sign structure* at 38 Bradley Street, East Haven." (Emphasis in original). (R at 58). Furthermore, the respondent presented evidence and the Superior Court concluded that "the evidence was that on-site advertising within interchanges, while distracting, was less so and less of a traffic hazard than off-site advertising." (R at 26–27).

The Connecticut Supreme Court presented substantial reasons justifying its conclusion that the regulation promoted highway safety and was narrowly drawn to achieve that purpose:

The defendant maintains that the regulations fail to serve a significant state interest and to advance that interest directly, as the second and third criteria require. The trial court found, however, that "there was substantial evidence that commercial signs at highway interchange areas contribute to accidents." The chief transportation engineer of the department of transportation had testified: " '[I]n interchange areas, especially major highways of this type, the decision-making is very intense at this point. A driver must make up his mind . . . whether [he is] going to exit at that point or . . . going to go forward to a further destination. They have to be concerned abut the driver [who] does want to exit but is in the wrong lane and may dart across their path. There are intense areas. Those are the areas that have the greatest amount of accidents on expressways. Therefore, the regulation asking that the signs not be erected within five hundred feet of these on and off ramps is designed to clear the boards . . . and leave that area as open as possible for intelligent decision-making by the driver. . . .' " This testimony plainly supports the court's finding.

Many courts have concluded that a governmental judgment that highway billboards are traffic hazards is not manifestly unreasonable and should not be set aside. See *E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1142, 1152 (5th Cir. 1970); *Inhabitants, Town of Boothbay v. National Advertising Co.*, 347 A.2d 419, 422 (Me. 1975); *General Outdoor Advertising Co. v. Department of Public Works*, 289 Mass. 149, 180–81, 193 N.E. 799 (1935); *In re Opinion of the Justices*, 103 N.H. 269, 270, 169 A.2d 762 (1961); *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 321, 600 P.2d 259 (1979); *New York State Thruway Authority v. Asley Motor Court, Inc.*, 10 N.Y.2d 151, 155–56, 219 N.Y.S.2d 640, 176 N.E.2d 566 (1961); *Newman Signs, Inc. v. Hjelle*, 268 N.W.2d 741,

757 (N.D. 1978); *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 438, 200 N.E.2d 328 (1964); *Lubbock Poster Co. v. Lubbock*, 569 S.W.2d 935, 939 (Tex.Civ.App. 1978); *State v. Lotze*, 92 Wash.2d 52, 59, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979); *Markham Advertising Co. v. Washington*, 73 Wash.2d 405, 420–21, 439 P.2d 248 (1968); but see *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 11, (1st Cir. 1980); *Metromedia, Inc. v. Des Plaines*, 26 Ill. App.3d 942, 946, 326 N.E.2d 59 (1975); *State ex rel. Dept. of Transportation v. Pile*, 603 P.2d 337, 343 (Okla. 1979). Even at a time when motor vehicles moved more slowly, this court observed that "[highway billboards] may obstruct the view of operators of automobiles on the highway and may distract their attention from their driving . . ." *Murphy, Inc. v. Westport*, 131 Conn. 292, 295, 40 A.2d 77 (1944). "We . . . hesitate to disagree with the accumulated, common-sense judgments of . . . lawmakers and of many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia, Inc. v. San Diego*, supra, 453 U.S. at 509, 101 S.Ct. at 2893; see *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949).

There can be little doubt that public safety on the highway is a substantial governmental interest. A regulation restricting the location of billboards designed to be seen by motorists travelling at high speeds on a highway such as I-95 by excluding such distractions from especially hazardous areas where vehicles enter or leave the highway may reasonably be viewed as implementing that interest and directly advancing it.

Burns v. Barrett, supra, 212 Conn. at 182–184, 561 A.2d at 1382.

In addition to concluding that the statutes and regulations in issue serve an important governmental purpose, traffic safety, the Connecticut Supreme Court also held that the statutes and regulations were narrowly drawn to serve that purpose:

> The trial court also found that the regulation satisfied the fourth *Metromedia, Inc.*, criterion, that the restriction reach "no further than necessary to accomplish the given objective"; *Metromedia, Inc. v. San Diego*, supra, 453 U.S. at 507, 101 S.Ct. at 2892; concluding that the regulation was "narrowly drawn" to achieve "the important objectives of traffic safety and esthetics. . . ." The defendant disputes this conclusion, contending that the restriction leaves open no alternative channels for communication with such a significant audience as the motoring public. He relies upon *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977), in which an ordinance prohibiting on-site "For sale" signs was invalidated because it eliminated a particularly effective medium of commercial speech, leaving only more expensive and less efficient media available. In the present case, however, the restriction cannot be characterized as a complete ban on a standard means of communication, such as outdoor advertising, or an insurmountable barrier to reaching motorists. It is applicable only to signs within 500 feet of interchanges, leaving the remainder of the highway available for outdoor advertising, unless some other regulation prohibits it. As we have previously noted, the regulation also exempts more populous municipalities from its operation. It applies only to "interstate highways, limited access federal-aid, primary highways." Regs., Conn. State agencies § 13a-123-1. The defendant is left free to erect outdoor advertising signs, even off-premises signs, along extensive stretches of our highway system. In true perspective, the restriction imposed by this regulation

> on the defendant's ability to communicate must be regarded as minimal. We agree with the trial court that it goes no further than necessary to achieve the important governmental purpose of reducing the risk of highway accidents at interchange areas. With respect to his commercial signs, therefore, the defendant has failed to demonstrate that the challenged regulation infringes upon his right of freedom of speech.

Burns v. Barrett, supra, 212 Conn. at 185-186, 561 A.2d at 1383.

Accordingly, there was substantial evidence supporting the Connecticut Supreme Court's holding that the statutes and regulations in issue are narrowly drawn to serve a significant governmental interest in highway safety and do not violate the First Amendment to the United States Constitution. Furthermore, as is clear from the decision of the Connecticut Supreme Court, its decision does not come within any of the categories set forth in Rule 17 to form the basis of granting of certiorari. Therefore, this Court should not grant a writ of certiorari in this case.

II. THE CONNECTICUT SUPREME COURT DID NOT ERR IN CONCLUDING THAT THE STATUTES AND REGULATIONS IN ISSUE ARE CONTENT-NEUTRAL AND DO NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The petitioner's argument that the statutes and regulations in issue are not content-neutral rests on a distortion of the facts in this case. As was discussed in the Statement of the Case, the Connecticut Supreme Court expressly held that the on-site exemption applies to non-commercial speech as well as to commercial speech. Thus, the petitioner's contention at page 20 of its brief that "there is no similar exemption

for non-commercial signs" is squarely at odds with what the Connecticut Supreme Court held. The Connecticut Supreme Court clearly stated:

> We construe the regulation, however, to include in the exception for on-premises signs those relating to non-commercial as well as commercial activities located on the premises, such as those of a hospital, church, club, political organization or other noncommercial institution. For example, if some organization of veterans were located on the premises where the defendant has placed his sign concerning Vietnam veterans, the requisite relationship between the sign and activities conducted on the premises would exist. Such a noncommercial message could also be sponsored by a business conducted on the site of the sign for the purpose of advertising the business, since many advertisements contain statements of public interest not directly related to the wares sold by the sponsor but intended to attract attention or create good will for its benefit. The exception for on-premises signs, therefore, does not authorize the state to limit in any manner the content of signs erected by those conducting activities on the premises so long as the signs have some reasonable relationship to those activities.

Burns v. Barrett, supra, 212 Conn. at 189, 561 A.2d at 1385.

Furthermore, the Connecticut Supreme Court clearly explained that the statutes and regulations in issue do not create a preference for commercial speech over noncommercial speech.

> Our interpretation of the on-site exception in this case, however, does not create any preference for commercial messages. Anyone conducting any activity on property where a sign is to be erected may display either commercial or noncommercial advertisements

> that have some reasonable relationship to an activity conducted thereon. We need not explore the extremes to which advertising signs must go before they can be deemed not to relate to activities being conducted on the premises, because in this case the defendant does not claim that any activity is being carried on at the location of the Vietnam veterans sign.

Burns v. Barrett, supra, 212 Conn. at 190, 561 A.2d at 1385.

The petitioner also contends, "Non-commercial expression is entitled to more protection than commercial expression under the First Amendment and thus equal treatment of the two is constitutionally deficient." Petitioner's Brief at 21. However, all of the justices in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (plurality opinion) indicated that distinctions between on-site and off-site signs are permissible as long as they are neutrally applied. The plurality reaffirmed the Court's holding in *Suffolk Outdoor Advertising v. Hulse,* 439 U.S. 808 (1978) (dismissing appeal of 43 N.Y.2d 483, 373 N.E.2d 263 (1977)), that differing governmental interests implicated by the two types of signs justified differing treatment as long as the ordinance did not favor one type of speech over another based on its content. *See Metromedia, supra,* at 510–512. Justice Brennan's concurrence and Justice Stevens' dissent both viewed on-site and off-site signs as completely different media, and, therefore, found it unnecessary to consider the ordinance's impact on on-site signs. *See id.* at 526 n.5; *id.* at 532 n.9 (Brennan, J., concurring); *id.* at 542–548 (Steven, J., dissenting in part). The Chief Justice indicated that an exception allowing on-site commercial signs was permissible even if non-commercial signs were totally banned. *Id.* at 567–568 (Burger, Ch. J., dissenting).

The *Metromedia* court struck down the San Diego ordinance, however, due to several features that are not present in the Connecticut statutory scheme. To the plurality, one of the ordinance's chief flaws was that it excepted on-site advertising for "goods or services available on the property," but

provided "no similar exception for non-commercial speech." *Id.* at 503, 513. The plurality held that the ordinance thus violated the First Amendment by imposing greater restrictions on non-commercial signs than on commercial ones. *Id.*

In the case at bar, however, the Connecticut Supreme Court expressly held that the regulations and statutes at issue treat on-site non-commercial speech exactly the same as commercial speech, which distinguishes this case from *Metromedia*. *Burns v. Barrett, supra,* 212 Conn. at 188–190, 561 A.2d at 1384–85.

In addition, the plurality in *Metromedia* indicated that other distinctions in the San Diego ordinance, such as special provisions allowing political campaign signs but not permitting other sorts of ideological messages, represented an improper attempt to allow or disallow signs throughout the city based on their content. *Id.* at 514–515. These distinctions are not present in this case.

The Connecticut Supreme Court distinguished other cases cited by the petitioner:

> The defendant also relies upon *Adams Outdoor Advertising v. Newport News,* 236 Va. 370, 373 S.E.2d 917 (1988) in which a municipal ordinance banning off-premises signs, with specified exemptions, but permitting all on-premises signs bearing either commercial or noncommercial messages, was declared unconstitutional. The court, however, appears to have based its decision on the exemptions contained in the statute for various signs, depending upon their content, whether the signs were located on or off the premises, such as directional signs, civic or cultural event signs, and displays used for nonpartisan civic purposes or for opening a new store, business or profession. In *Metromedia, Inc.,* similar exceptions to the general prohibition against outdoor advertising signs were deemed to create a governmental prefer-

> ence for certain varieties of speech based upon content and to render the San Diego ordinance invalid. The defendant has not brought to our attention any exceptions in the regulations involved here that allow signs containing one kind of information but not another. The remaining case relied on by the defendant in which municipal ordinances were invalidated also involved exceptions, based on content, to a general prohibition against outdoor signs and not merely an exception for on-premises signs relating to activities conducted on the premises. *Matthews v. Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[n]o political signs are allowed in any district in the Town of Needham; yet such signs as 'For Sale' signs, professional office signs, contractors' advertisements, and signs erected for charitable or religious causes are allowed in all districts.").

Burns v. Barrett, supra, 212 Conn. 190–191, 561 A.2d at 1385–1386.

Another case cited by the petitioner, *Van v. Travel Information Council*, 52 Or. App. 399, 628 P.2d 1217, 1224–27 (1981), is clearly distinguishable because the Oregon regulations broadly allowed on-site commercial signs but imposed narrow time limitations on the posting of non-commercial political signs whereas the Connecticut statutes and regulations in issue treat commercial and non-commercial speech exactly the same. The other case cited by the petitioner, *Major Media of the Southeast v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1334 (1987), stated that the distinction between off-site and on-site signs is valid under *Metromedia* if an ordinance "does not treat commercial speech more favorably." That case did not hold that non-commercial speech must be treated more favorably than commercial speech. *Id.*

The Connecticut Supreme Court observed that in the only two cases involving regulations or statutes similar to those at

issue in Connecticut, the courts upheld their validity against constitutional challenge:

> In *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), cert. denied. ____ U.S. ____, 108 S.Ct. 702, 98 L.Ed.2d 653, reh. denied, ____ U.S. ____, 108 S.Ct. 1127, 99 L.Ed.2d 287 (1988), the court upheld a regulation similar to our § 13a-123-7(2) that permitted on-premises signs "that contain a message relating to an activity or the sale of a product on the property on which they are located." 603 Ky.Admin.Regs. 3:010, § 2(3) (1975). The regulation was construed to permit both commercial and non-commercial signs in protected areas so long as the signs relate to activities on the premises. Accordingly, the regulation was deemed to "apply even handedly to commercial and noncommercial speech." *Wheeler v. Commissioner of Highways, supra*, at 590. The court relied in part upon *Heffron v. International Society for Krishna Consciousness, Inc.*, supra, where the United States Supreme Court had upheld a content-neutral prohibition on the sale, exhibition or distribution of materials at a state fair except from fixed locations. "Kentucky, by allowing persons who own or lease property, to have a sign, subject to size and space restrictions, advertising an activity conducted on the property is not favoring one message over another. The state has simply recognized that the right to advertise an activity conducted onsite is inherent in the ownership or lease of the property." *Wheeler v. Commissioner of Highways, supra*, 591; see *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977) (suggesting that a prohibition against on-premises "For Sale" signs raises "serious questions . . . as to whether the ordinance 'leave[s] open ample alternative channels for communication.' " [quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48

> L.Ed.2d 346 (1976)]). The Supreme Court of Washington has reached a conclusion similar to that of *Wheeler,* upholding the allowance of on-premises signs advertising activity conducted on the property where the signs are located as an exception to a general prohibition against signs visible from certain highways. *State v. Lotze, supra* [92 Wash.2d 52, 593 P.2d 811, appeal dismissed, 444 U.S. 921, 100 S.Ct. 257, 62 L.Ed.2d 177 (1979)].

Burns v. Barrett, supra, 212 Conn. at 191–192, 561 A.2d at 1386.

Thus, the Connecticut Supreme Court held that the Conn. Statutes and Regulations were content-neutral and did not favor commercial over non-commercial speech.

Furthermore, there is no conflict among the federal court of appeals or state courts regarding the type of regulations and statutes at issue in this case, and, therefore, this Court should not grant certiorari. *See* Supreme Court Rule 17 (standard for granting certiorari).

The Connecticut Supreme Court correctly held that the statutes and regulations in issue are content-neutral and do not violate the First Amendment to the United States Constitution. Accordingly, this Court should deny the petition for a writ of certiorari.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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